Court of Appeals

STATE OF NEW YORK

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,
Plaintiff-Respondent,

—against—

KINGSLEY BOOKS, INC., MARTIN KLEINBERG and LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP,
Defendants-Appellants,

—and—

METROPOLITAN BOOK SHOP, INC., ANNE GOLDBERG, PHILIP PELLEGRINO, doing business as PELLEY BOOK SHOP, PUBLISHERS OUTLET and GORDON LAW,
Defendants.

Statement Under Rule 234

This action was commenced by the service of the summons and complaint on the defendants-appellants Kingsley Books, Inc. and Martin Kleinberg and Louis Finkelstein on September 10, 1954.

Issue was joined by the service of the amended answer of said defendants on October 30, 1954. The other defendants who were served did not answer. The names of the original parties in full are: Adrian P. Burke was the plaintiff originally and was substituted by Peter Campbell

Notice of Appeal of Defendants, Kingsley Books, Inc. and Martin Kleinberg

Yours, etc.,

EMANUEL REDFIELD
Attorney for Defendants,
Kingsley Books, Inc. and
Martin Kleinberg
Office & P. O. Address
60 Wall Street
New York 5, New York

To:

CLERK, COUNTY OF NEW YORK

To:

PETER CAMPBELL BROWN, ESQ.
Corporation Counsel
Municipal Building
New York, New York

Notice of Appeal of Defendant, Louis Finkelstein

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that the defendant, Louis Finkelstein, doing business as Times Square Book Shop, pursuant to Section 588, sub. 4 of the Civil Practice Act, do hereby appeal to the Court of Appeals of the State of New York from the judgment of this court, dated July 26, 1955, and entered in the office of the Clerk of the County of New York on August 11, 1955, and from each and every part of said judgment.

Dated: New York, New York
August 12, 1955.

Yours, etc.,

SIDNEY GLASSER
Attorney for Defendant,
Louis Finkelstein, d/b/a
Times Square Book Shop Inc.
Office & P. O. Address
15 East 40th Street
New York, New York

To:

(All attorneys of record)

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Statement Under Rule 234

Brown. The original defendants were as appear on the summons. Upon the trial the title of the action was changed by eliminating "Times Square Book Shop" as a defendant and correcting defendant "Louis Finkelstein" to read "Louis Finkelstein doing business as Times Square Book Shop". At the trial the defendant "Pelley Book Shop" was eliminated and the defendant "Philip Pellegrino" was corrected to "Philip Pellegrino doing business as Pelley Book Shop". At the trial, the action was severed against the following defendants, who were not served with process: Anne Goldberg, Publishers Outlet and Gordon Law.

Notice of Appeal of Defendants, Kingsley Books, Inc. and Martin Kleinberg

SUPREME COURT

NEW YORK COUNTY

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Plaintiff,

—against—

KINGSLEY BOOKS, INC., MARTIN KLEINBERG, METROPOLITAN BOOK SHOP, INC., ANN GOLDBERG, LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, PHILIP PELLEGRINO, doing business as PELLEY BOOK SHOP, PUBLISHERS OUTLET and GORDON LAW,

Defendants.

SIR:

PLEASE TAKE NOTICE that the defendants, Kingsley Books, Inc. and Martin Kleinberg, pursuant to Section 588, sub. 4 of the Civil Practice Act, do hereby appeal to the Court of Appeals of the State of New York from the judgment of this court, dated July 26, 1955, and entered in the office of the Clerk of the County of New York on August 11, 1955, and from each and every part of said judgment.

Dated: New York, New York
August 12, 1955.

16 **Summons**

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

ADRIAN P. BURKE, as Corporation Counsel of the City of New York,

Plaintiff,

—against—

KINGSLEY BOOKS, INC., MARTIN KLEINBERG, METROPOLITAN BOOK SHOP INC., ANNE GOLDBERG, TIMES
17 SQUARE BOOK SHOP, LOUS FINKELSTEIN, PELLEY BOOK SHOP, PHILIP PELLEGRINO, PUBLISHERS OUTLET, GORDON LAW,

Defendants.

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and serve a copy of your answer or if the complaint is not served with this summons to serve a notice of appearance on the
18 Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear, or answer, judgment will be taken against you by default, in accordance with the notice herein.

Dated, New York, September 10, 1954.

ADRIAN P. BURKE,
Corporation Counsel,
Attorney for Plaintiff,
Office and Post-Office Address,
Municipal Building,
Borough of Manhattan,
New York City.

Complaint

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, complaining of the defendants, alleges as follows:

1. That the plaintiff is the duly appointed Corporation Counsel of the City of New York.

2. That by the provisions of Sec. 22-a of the Code of Criminal Procedure of the State of New York, the Corporation Counsel of the City of New York is expressly empowered to maintain an action for an injunction against any person, firm or corporation who sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute any book, magazine, pamphlet, comic books, story paper, writing paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of the same.

3. Upon information and belief each of the defendants other than the defendants Kingsley Books, Inc. and Martin Kleinberg, is a person, firm or corporation in the City of New York, who

sells and/or is about to sell, or has in his possession with intent to sell a publication entitled "Nights of Horror".

4. Upon information and belief each of the defendants Kingsley Books, Inc. and Martin Kleinberg is a person, firm or corporation in the City of New York, who sells and/or distributes, and/or is about to sell and/or distributes, and/or has in his possession with intent to sell and/or distribute a publication entitled "Nights of Horror."

5. That all issues of said publication, "Nights of Horror" are obscene, lewd, lascivious, filthy, indecent and disgusting and in violation of the law. Annexed hereto and made a part hereof are issues numbered 1 through 14 of the publication, "Nights of Horror" as Exhibits 1 to 14 inclusive.

6. That the publication, "Nights of Horror", issues 1 through 14 is one which clearly comes within the purview of Sec. 22-a of the Code of Criminal Procedure.

WHEREFORE, plaintiff prays for a judgment as follows:

(a) Permanently enjoining and restraining the defendants their agents and servants from acquiring, selling and/or distributing any of the issues of the publication entitled "Nights of Horror";

(b) Directing said defendants, their agents and servants to surrender to the Sheriff of the County

of New York all and any issues of the publication entitled "Nights of Horror" within their possession and control and

(c) Directing the said Sheriff of the County of New York to seize and to destroy the same, and

(d) That plaintiff recover the costs and disbursements of this action and that plaintiff have such other and further relief as may be just and proper.

Dated: New York September 10, 1954.

ADRIAN P. BURKE, Esq.,
Plaintiff, in his representative capacity as Corporation Counsel of the City of New York

(Verified September 10, 1954.)

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Amended Answer of Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

29 Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, doing business as Times Square Book Shop, by Sidney Glasser, their attorney, for their amended answer to the complaint herein:

1. Deny any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs numbered "2" and "3" of said complaint and therefore deny the same.

30 2. Deny each and every allegation contained in paragraphs numbered "4", "5" and "6" of said complaint.

AS AND FOR A FIRST SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, SAID DEFENDANTS ALLEGE:

3. That Section 22A of the Code of Criminal Procedure of the State of New York is unconstitutional, in that it is contrary to and violates the provisions of the United States and New York State constitutions.

Amended Answer of Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein

AS AND FOR A SECOND SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, SAID DEFENDANTS FURTHER ALLEGE:

4. That the Charter of the City of New York fails to provide any authority to and precludes plaintiff from bringing this action.

WHEREFORE, said defendants demand judgment dismissing the complaint herein with costs.

SIDNEY GLASSER,
Attorney for Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, d/b/a Times Square Book Shop.

(Verified October 20, 1954.)

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Judgment Appealed From

At a Special Term, Part VI of the Supreme Court, held in and for the County of New York, at the County Court House, in said county on the 26 day of July, 1955.

Present:

HON. MATTHEW M. LEVY, *Justice.*

35

[SAME TITLE—NOTICE OF APPEAL PAGE 3]

The above entitled action having come on for trial before me at a Special Term, Part VI of this Court on the 14th day of December, 1954, and the plaintiff having appeared by Adrian P. Burke, Corporation Counsel (Murray Rudman, Esq. of Counsel), and the defendants Kingsley Books, Inc., and Martin Kleinberg, having appeared by Emanuel Redfield, Esq., and the defendant, Louis
36 Finkelstein, doing business as Times Square Book Shop, having appeared by Sidney Glasser, Esq., and the defendants Metropolitan Book Shop, Inc. and Philip Pellegrino, doing business as Pelley Book Shop not having appeared, and the defendants Anne Goldberg, Publishers Outlet and Gordon Law not having been served with process, and the plaintiff's motion to substitute Peter Campbell Brown, Corporation Counsel of the City of New York as plaintiff instead of Adrian P. Burke, Corporation Counsel of the City of New York, and to amend the title of this action

accordingly, having been granted, and the plaintiff's motion to amend the title of the action so as to read "Louis Finkelstein, doing business as Times Square Book Shop" instead of "Times Square Book Shop, Louis Finkelstein" and "Philip Pellegrino, doing business as Pelley Book Shop" instead of "Pelley Book Shop, Philip Pellegrino", having been granted, and the parties having presented their proofs upon the issues herein and the Court having reserved decision at the close of the entire case, and due deliberation having been had, and the Court having thereafter on the 13th day of June, 1955, made and filed its decision rendering judgment in favor of the plaintiff on the merits,

Now, upon motion of Peter Campbell Brown, Corporation Counsel, plaintiff in person, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment in his favor on the merits on the decision as rendered, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Philip Pellegrino, doing business as Pelley Book Shop, be and they hereby are permanently enjoined from distributing, selling or acquiring possession of Volumes I and II and Issues 3 to 14 inclusive of the volumes of the publication entitled "Nights of Horror" heretofore published, and it is further

40 ORDERED, ADJUDGED AND DECREED that the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Philip Pellegrino, doing business as Pelley Book Shop, are directed forthwith to surrender to the City Sheriff of the City of New York (New York County Division) all copies of volumes I and II and Issues 3 through 14 inclusive of the publication entitled "Nights of Horror" heretofore published and now in possession of said defendants; 41 said volumes to be destroyed by the Sheriff of the City of New York (New York County Division) upon receipt, and it is further

ORDERED, ADJUDGED AND DECREED that in the event the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop and Philip Pellegrino, doing business as Pelley Book Shop, fail to surrender all copies of the volumes of the publication entitled "Nights of Horror" heretofore published, and now in the 42 possession of said defendants to the City Sheriff of the City of New York (New York County Division) within two days after the entry of this judgment the aforesaid Sheriff of the City of New York (New York County Division) is directed to seize and destroy all of the aforesaid volumes, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff Peter Campbell Brown, Corporation Counsel of the City of New York, (Municipal Building, Borough of Manhattan, New York City), recover

of the defendants Kingsley Books, Inc. (220 West 42nd Street, New York City), Martin Kleinberg (224-15—135th Avenue, Laurelton, L. I.), Metropolitan Book Shop, Inc. (1133—6th Avenue, New York City), Louis Finkelstein, doing business as Times Square Book Shop (225 West 42nd Street, New York City), and Philip Pellegrino, doing business as Pelley Book Shop (790—8th Avenue, New York City), the sum of $150 costs as taxed, and that said plaintiff have execution therefor.

Enter

M. M. L.
J. S. C.

46

Case and Exceptions

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART VI

[SAME TITLE]

47 New York, December 14, 1954.

Before:

MR. JUSTICE MATTHEW M. LEVY

Appearances:

ADRIAN P. BURKE, Esq.,
Corporation Counsel of the City of New York,
Attorney for the Plaintiff,
By: MURRAY RUDMAN, Esq., of Counsel.

48 EMANUEL REDFIELD, Esq.,
Attorney for Defendants Kingsley Books, Inc., and Martin Kleinberg.

SIDNEY GLASSER, Esq.,
Attorney for Defendant Louis Finkelstein, doing business as Times Square Book Shop.

(All the other defendants have defaulted.)

Mr. Rudman: If your Honor please, all the defendants for whom appearance has not been noted have defaulted. The defendants Publishers

Outlet and Gordon Law were not served with process. Nor the defendant Anne Goldberg who is dead.

(Mr. Rudman made an opening statement to the Court.)

(Mr. Redfield made an opening statement to the Court.)

(Mr. Glasser made an opening statement to the Court.)

The Court: Mr. Redfield, do you desire to move to amend your answer in any respect?

Mr. Redfield: Yes, sir. I move to amend Paragraph 2 of the answer so as to eliminate the denial of Paragraph 4 of the complaint and to admit the facts alleged in Paragraph 4 of the complaint.

The Court: Are there any other proposed amendments?

Mr. Redfield: None other from me.

Mr. Glasser: On behalf of Louis Finkelstein, doing business as Times Square Book Shop, I ask the Court for permission to amend the answer of Paragraph 1 and admit that Paragraph 3 of the complaint, formerly denied in the answer, is now admitted.

FRANCIS X. CAIN, called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your occupation? A. Detective Police Department, Shield No. 1061, Central Office Bureau.

Q. Mr. Cain, how long have you been in the Police Department of the City of New York? A. Three and a half years.

Q. How long have you been a detective? A. Two years.

Q. During the last year, what have been your duties as a detective for the City of New York? A. I have been assigned to the Office of the Chief Inspector, relative to public morals.

Q. By that, what do you mean? A. Suppression of vice, gambling, alcoholic beverage control.

Q. I refer you to 1133 Sixth Avenue in the City of New York and I ask you if you are familiar with that address? A. Yes, sir, I am.

Q. Tell the Court the basis of your familiarity with that address? A. Premises 1133 Sixth Avenue is a four-story loft building. The name of the establishment on the ground floor is Metropolitan Book Shop, Inc.

Mr. Glasser: Objected to as not binding on my defendant.

The Court: He is merely describing the premises. Objection overruled.

By Mr. Rudman:

Q. Are you also familiar with the establishment of the Kingsley Book Company? A. Yes, sir.

Q. Are they located at 220 West 42nd Street? A. Yes, sir.

By the Court:

Q. Near what numbered street is 1133 Sixth Avenue? A. May I refer to some notes?

Q. Surely. A. I believe it is between 43rd and 44th Streets.

Q. You may check with your memorandum. A. That is correct, it is, your Honor.

By Mr. Rudman:

Q. And where is 220 West 42nd Street? A. On the south side of 42nd Street, between 7th and 8th Avenues, Manhattan.

Q. Describe the premises 220 West 42nd Street, to the best of your recollection? A. It is approximately a 24 or 25-story building. Kingsley Books, Inc. is located on the ground floor of the premises. 56

Q. When for the first time did you go to the Kingsley Books, Inc.? A. August 23rd.

By the Court:

Q. What year? A. 1954.

By Mr. Rudman: 57

Q. Did you enter the premises? A. I did.

Q. Tell the Court exactly what you did from the time you entered the premises until you left on that day.

Mr. Redfield: We have admitted Paragraphs 3 and 4 of the complaint. This seems to be a waste of time.

The Court: Mr. Glasser admitted Paragraph 3. Mr. Redfield admitted Paragraph 4 but Mr. Redfield has not admitted Paragraph 3 and Mr. Glasser has not admitted

58 *Francis X. Cain—for Plaintiff—Direct*

Paragraph 4. Therefore I will take the testimony.

Mr. Redfield: I assume we made the admission with regard to our respective clients who are alleged to have possession of these premises. If there is any doubt about it, we can again admit it.

The Court: But you have not done it and I can only go by the pleadings.

Mr. Redfield: If you are of the opinion
59 that Paragraph 3 of the complaint applies to Kingsley Books and Martin Kleinberg, then we admit the allegations of Paragraph 3 of the complaint.

The Court: I am not expressing an opinion. I am taking testimony with respect to the defendants who have appeared and with respect to the defendants who have appeared and with respect to the defendants who have been served and have defaulted, and I shall take all of the testimony.

In the event that it is not applicable to
60 your particular client, it will not be referrable to your client.

Mr. Redfield: I submit to your Honor, with deference, that it is just duplication.

The Court: What will I do with respect to the defendants who have defaulted? Have another hearing?

Mr. Redfield: I see what your Honor means.

By Mr. Rudman:

Q. Describe the establishment of the Kingsley Books, Inc., what you saw when you walked into

the premises? A. On the outside there are two display windows, the entrance being between the two display windows.

To the left of the entrance there is a cash register on a platform and on both sides and towards the rear there are book shelves upon which are displayed books.

There are desks in the middle of the floor and shelves, also displaying books.

To the left and behind the cash register there was a table approximately six feet long and about 62
three feet off the floor, upon which were displayed Volumes 1 to 16 of the book entitled "Nights of Horror."

Each volume is numbered and there were approximately 15 to 25 in the stack of each volume. I purchased two volumes of the book.

Q. Which volumes did you purchase? A. Correction—I purchased three volumes of Nos. 2, 5 and 7.

Q. Were Volumes numbered 1 through 14 in those stacks A. Yes, sir.

Q. When you say "stacks," was there a dif- 63
ferent volume in each one of the stacks or a different issue number? A. A different issue number.

Q. Did you look through each one of the stacks? A. Yes, sir.

Q. Tell the Court approximately how many were there in each of the stacks? A. There was a maximum of 25 and a minimum of 10 or 12.

Q. Did you make your purchase from the stacks? A. Yes, sir, I did.

Q. After you selected your books, what did you do with them? A. I presented them to a

64 *Francis X. Cain—for Plaintiff—Direct*

gentleman, an unidentified man I now know to be Martin Kleinberg who was at the register.

I gave him the books and I asked him how much it was and he told me it was six dollars. I paid him and I asked him for a receipt, which I received and I left the premises.

Q. Did you return to the premises on August 25, 1954? A. I did.

Q. And did you make another purchase on that day? A. Yes, sir.

65 Q. What volumes did you purchase? A. Nos. 3 and 4.

Q. What did you do with your selections after you made them? A. I presented the books to an unidentified man I now know as Arthur Zohn and I asked him how much it would be and he told me it was four dollars. I gave him the money and he gave me a receipt and I left the premises.

Q. Was Martin Kleinberg there at the time? A. Yes, sir.

Q. On August 25, 1954, did you also observe the same stacks you testified to that you saw on August 23, 1954? A. Yes, sir.

66 Q. And were all these issues on the table that you testified to that you observed on August 23, 1954? A. Yes, sir.

Q. I show you these books and I ask you if you have ever seen them before? A. Yes, sir, I have.

Q. Are those the books you testified to that you saw on the stacks on the table of the Kingsley Book Company? A. Yes, sir.

Q. On August 23rd and on August 25th? A. Yes, sir.

Mr. Rudman: I offer them in evidence.

Mr. Redfield: No objection.

Francis X. Cain—for Plaintiff—Direct 67

(Books received in evidence and marked Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L and 1-M.)

Mr. Rudman: Is it conceded that Volumes 15 and 16 are similar in type and design as Volumes 1 to 14?

Mr. Glasser: No. It is not involved in this proceeding at all. Volumes 15 and 16 were not enjoined against. 68

By Mr. Rudman:

Q. Did you examine Volumes 15 and 16 in the Kingsley Book Shop?

Mr. Redfield: Objected to as outside the pleadings.

Mr. Glasser: Same objection.

The Court: I will take it subject to connection. Do you have Volumes 15 and 16 here?

Mr. Rudman: No, sir. 69

By Mr. Rudman:

Q. Did you examine Volumes 15 and 16? A. Yes, sir.

Q. And were they similar in scope and design? A. Yes, sir.

Mr. Redfield: Objection as not the best evidence.

The Court: Objection sustained. Strike out the answer.

70 *Francis X. Cain—for Plaintiff—Direct*

By Mr. Rudman:

Q. When was the next time you visited the premises of the Kingsley Books, Inc., at 220 West 42nd Street? A. On September 10, 1954.

Q. What did you do at that time when you went to the premises? A. I had papers that were given to me by the Corporation Counsel, Mr. Milton Mollen, said papers being an injunction and an order to show cause, which was to be
71 served upon Kingsley Books, Inc., as a corporation and on Martin Kleinberg as President.

I entered the premises with a patrolman from the Legal Bureau of the Police Department of the City of New York.

Mr. Kleinberg was at the cash register at the time. I handed him the papers and I explained to him what they were. I told him that we were entitled to take an inventory of the books "Nights of Horror" that were on the premises.

I left Mr. Kleinberg and I walked towards the rear of the establishment and proceeded to the cellar.

72 There I saw two men, unknown to me at the time, but who I now know to be Louis Finkelstein and Edward Mishkin.

Mr. Mishkin asked me who I was. I identified myself as a police officer. I told him I had come down to take an inventory of the books "Nights of Horror." I told I had just served papers upon Mr. Kleinberg and that we were entitled to take the inventory.

Mr. Mishkin showed me where the books were in the rear of the store and I started to take the inventory. When I had completed it, there

were approximately 2,650 volumes of "Nights of Horror" in the cellar.

Q. Is this the inventory you prepared (handing witness paper)? A. Yes, sir.

Q. And did you see Martin Kleinberg sign that? A. Yes, sir.

Mr. Rudman: I offer that paper in evidence.

Mr. Redfield: No objection, except that it is just burdening the record. We have admitted all these facts. 74

(Inventory received in evidence and marked Plaintiff's Exhibit 2.)

By the Court:

Q. What does "SS" followed by a number mean? A. His Social Security number.

Q. What address? A. That is his home address.

By Mr. Rudman: 75

Q. Does this inventory you prepared include the books that were on the table in the store which you testified to on August 23rd and 25th? A. Yes, sir.

By the Court:

Q. These were the books you took an inventory of in the cellar? A. Yes, sir.

By Mr. Rudman:

Q. You testified you visited the premises 1133 Sixth Avenue, otherwise known as the Metropolitan Book Shop, Inc.? A. Yes, sir.

76 *Francis X. Cain—for Plaintiff—Direct*

Q. When for the first time did you visit the Metropolitan Book Shop, Inc.? A. On August 17, 1954.

Q. Describe those premises to the Court. A. They are a four-story loft building. Metropolitan Books is located on the ground floor of said premises. There are two glass show windows on the outside, with the doorway entrance in between the two. As you enter, the cash register of the establishment is on the left side. There are book
77 shelves to the left and right and to the rear of the store. There are desks in the middle of the floor with books thereon displayed for sale.

Q. Did you observe "Nights of Horror" in that book shop on August 17, 1954? A. Yes, sir.

Q. Where were they located? A. On the book shelf to the left in the rear of the cash register.

Q. Was that in open view of all customers? A. Yes, sir.

Q. Did you make any purchases on that day of "Nights of Horror"? A. Yes, sir.

Q. What issues of the "Nights of Horror" did
78 you purchase? A. Volumes 9, 11 and 14.

Q. And what did you do with your selection after you made it? A. I presented the books to a gentleman I now know to be Ira Rubian. I asked him how much the books would be. He told me $9.27.

Q. Did you pay the $9.27? A. I did.

Q. And did you receive a receipt for it? A. Yes, sir.

Q. Did you return to the Metropolitan Book Shop thereafter on August 18 1954? A. I did.

Q. And did you make any further purchases? A. Yes, sir.

Q. What books did you purchase on that day? A. Issues 12 and 13 of "Nights of Horror."

Q. Did you pay for it? A. Yes, sir.

Q. How much did you pay? A. $6.18.

Q. When you made the purchases in Kingsley Books, you paid for each one of the purchases, is that correct? A. Yes, sir.

Q. On August 17, 1954, when you made the purchases of issues Nos. 9, 11 and 14, how many issues of "Nights of Horror" did you see in the Metropolitan Book Shop? A. About five or six. 80

Q. And on August 18, 1954, how many did you see? A. About three or four.

Q. Thereafter and on September 10th, did you make your next visit there? A. I did.

Q. And was that for the purpose of serving these papers that you served on Kingsley on September 10, 1954? A. Yes, sir.

Q. You served a copy of that on Metropolitan Book Shop? A. Yes, sir.

Q. Who did you see at that time when you made the service? A. A man who identified himself as Mr. Ira Rubian.

81

Q. And did you make an inventory of the books in the Metropolitan Book Shop, Inc., on September 10, 1954? A. Yes, sir, of "Nights of Horror."

Q. Where did you find the books to make the inventory? A. To the right of the store, about half way back, there was a small alcove in which the books were.

Q. I show you this paper and I ask you if that is the inventory you prepared on September 10, 1954, in the Metropolitan Book Shop, Inc., (handing paper to the witness)? A. Yes, sir, it is.

82 *Francis X. Cain—for Plaintiff—Direct*

Q. Did you make that inventory in the regular course of your business as a police officer in the Police Department of the City of New York? A. Yes, sir.

Q. And was it part of your duties to make that inventory on that day? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

Mr. Redfield: No objection.

83 (Inventory received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Glasser: I would like to make a blanket objection, as not related to my clients.

The Court: The evidence will be taken. So far as it is not connected with your clients, it will not be considered as against your client.

By Mr. Rudman:

84 Q. That is the last time you visited the Kingsley or the Metropolitan Book Shop? A. Yes, sir.

Q. Subsequently did you have occasion to make an arrest of a person named Maletta in Queens? A. Yes, sir.

Q. Tell us the date and place of the arrest.

Mr. Glasser: Objection as not binding on the defendants. It is unrelated.

The Court: Objection overruled.

Mr. Glasser: Exception.

The Witness: Wednesday, September

85

14, 1954, at about 5:30 or 6 P.M., at premises 103-43 Lefferts Boulevard, Richmond Hill.

By Mr. Rudman:

Q. Tell the Court what type of premises those are.

The Court: How will you relate that with the main defendants in the case?

86

Mr. Rudman: I will show that this is the printing establishment where "Nights of Horror" is printed.

The Court: I will take it subject to connection.

By Mr. Rudman:

Q. Tell the Court what type of premises those are. A. It is a two-story premises. The Pilgrim Press is located on the ground floor. The Pilgrim press was a gift card and stationery shop. In the rear the building was sub-let by another individual who sold watches and jewelry. The owner of the Pilgrim press was Mr. Eugene J. Maletta. He also had a cellar, the entrance to it being from the main floor of the card and gift shop.

87

Q. Did you buy anything there pertaining to "Nights of Horror"? A. Yes, sir.

Q. What was it? A. We found Volume No. 1 of "Nights of Horror," which Mr. Maletta gave to us and he said he had printed it up.

Mr. Glasser: I move to strike out the conversations.

88 *Francis X. Cain—for Plaintiff—Direct*

The Court: Strike it out.
Mr. Rudman: Consented to.
The Court: Proceed.

By Mr. Rudman:

Q. Tell us what you observed. A. I observed what is known in the printing trade as a rubber mat. On the rubber mat, in inverted type, if you held it to a mirror you could read what was on there, were pages of one of the volumes of
89 "Nights of Horror." I picked up about 500 sheets of different pages of different volumes of "Nights of Horror."

Q. Tell the Court what type of printing presses were in that premises. A. There were two printing presses in there. I was told that they are known as photo offset printing.

Mr. Glasser: Objected to as not binding, as to what he was told.
The Court: Objection sustained.

90 *By Mr. Rudman:*

Q. Do you know those presses as being photo offset presses at the present time? A. Yes, sir.

Mr. Redfield: I object to the testimony concerning the printer as being utterly outside the issues in the case.
The Court: I will take it subject to connection.

By Mr. Rudman:

Q. Do you know whether or not the "Nights of Horrors" exhibits 1 through 1-M are printed in offset type? A. Yes, sir, they are.

Mr. Rudman: You may inquire.

Mr. Redfield: No questions. At this time I move to strike out this witness's testimony insofar as it relates to Mr. Moletta on the ground there has been no showing of any connection with the issues in the case.

The Court: You may move at the close of the plaintiff's case.

Mr. Glasser: No questions.

JAMES RUSHIN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your position with the Police Department of the City of New York? A. Shield No. 2244—30th Squad—

Q. How long have you been such a detective? A. Two and a half years.

Q. How long have you been with the Police Department? A. Four and a half years.

Q. And for the past year what have been your duties with respect to your position? A. I am a precinct detective working on different cases that come into the squads.

Q. Assigned to the Morals Squad? A. Not definitely to the Morals Squad.

Q. On September 10th, did you visit the premises of the Times Square Book Shop? A. Yes, sir.

Q. Is that the first time you visited those prem-

94 ises? A. That was the second time. The first time was September 9th.

Q. In the Times Square Book Shop located at 225 West 42nd Street in the Borough of Manhattan, New York City? A. Yes, sir.

Q. Tell the Court what it looks like? A. It is a small shop approximately 15 feet wide, 30 feet long. It has a shelf on the left-hand side containing books, and shelves on the right-hand side.

95 Q. Is there a cash register in the store? A. Yes, sir, on the left of the door.

Q. Are there showcases as you enter the premises? A. There is a window on the left-hand side as you enter the store.

Q. Are books exhibited there? A. Yes, sir.

Q. Is there a sign outside which says, "Times Square Book Shop"? A. Yes, sir.

Q. On September 9, 1954, you went to the Times Square Book Shop? A. Yes, sir.

Q. What did you do? A. I went into the Book Shop and looked around. Then I went to the rear of the store, on the left of a counter, and

96 observed the book "Nights of Horror".

Q. How many copies of "Nights of Horror" did you see? A. There were 16 different issues, from one to three copies on each pile.

Q. About 40 in all? A. 40 to 45 approximately altogether.

Q. You bought one copy? A. Yes, sir.

Q. After you made your selection, what did you do with the copy? A. I took it to the clerk. I asked him the price. He told me "$2.00". I gave it to him and I left the premises.

Q. Did he wrap up the book? A. Yes, sir, in a bag.

Q. You came back the following day? A. Yes, sir. 97

Q. What did you do on that day? A. I had a copy of papers received from the Corporation Counsel. I presented them to the clerk, explained it to him, and I took an inventory of the books in the store at the time.

Q. Is this a copy of the inventory (handing witness paper)? A. Yes, sir.

Q. Was that made in the course of your regular duties as a police officer? A. Yes, sir. 98

Q. And was that pursuant to instructions given you by your superior? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

(Inventory received in evidence and marked Plaintiff's Exhibit 4.)

By Mr. Rudman:

Q. Are you familiar with the area within which 225 West 42nd Street is located? A. Not particularly. 99

Mr. Rudman: That is all.

Mr. Redfield: No questions.

Mr. Glasser: No questions.

JAMES J. MCCARTHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your occupation? A. Detective,

Shield No. 196, assigned to Manhattan River Front Squad.

Q. How long have you been with the Police Department? A. Seven years this month.

Q. How long have you bee a detective? A. A year and four months.

Q. What are your duties? A. General investigation on the river front.

Q. You don't make the investigations of morals? A. No, sir.

Q. Are you familiar with the premises 790 Eighth Avenue in the Borough of Manhattan, City of New York? A. Yes, sir.

Q. And is that the Pelley Book Shop? A. Yes, sir.

Q. Did you visit the premises on September 9, 1954? A. I did.

Q. Will you tell the Court what the premises appeared to be or what they looked like to you? A. Pelley's Book Shop is on the street level of a 5-story brick building, apparently a tenement.

It is a one-window store, approximately 25 to 30 feet wide, about 50 feet deep.

As you enter, the door is on the left side of the main display window. There are three walls covered with book shelves, the left-hand wall, the rear wall, the right-hand wall tiered shelves.

In the middle of the floor there is a tiered table containing books and to the left of the entrance is a raised platform enclosed where the proprietor, I imagine, sits.

Q. Did you see any "Nights of Horror" in the store on that day? A. On the left rear wall, about the third shelf from the floor, there was a shelf approximately 5 feet in length. On it was

displayed about 12 copies of the book "Nights of Horror".

Q. What volumes? A. They were various, from one to twelve.

Q. Did you buy any that day? A. I purchased a copy of the "Nights of Horror" No. 12.

Q. After you made your selection, what did you do with the book you purchased? A. I took it to the man on duty. I asked him the price. He said it was $4. I bought it. I asked him his name. He said that he was just watching the store while 104
the owned stepped out. Then the owner came in and I spoke to the owner. I identified myself as the detective and he identified himself as Philip Pellegrino, the owner of the shop.

Q. On September 10, 1954, did you come back to the premises? A. I did.

Q. What did you do? A. I had various papers to serve on the owner of the shop. I did that and I took an inventory of the books he had of "Nights of Horror".

Q. Were those papers given to you by the Corporation Counsel? A. Yes, sir.

Q. Was that an order to show cause and affidavit and summons and complaint? A. Yes, sir. 105

Q. They were in connection with this case? A. Yes, sir.

Q. Did you make an inventory of the books "Nights of Horror" that you found in the store on that day? A. I did.

Q. And is this the inventory (handing witness paper)? A. Yes, sir.

Q. And was that made in the regular course of your duties as a police officer? A. Yes, sir.

106 *James J. McCarthy—for Plaintiff—Direct*

Q. Pursuant to instructions of your superiors? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

(Inventory received in evidence and marked Plaintiff's Exhibit 5.)

By Mr. Rudman:

Q. Are you familiar with the general area in
107 which 790 Eighth Avenue finds itself? A. Fairly so.

Q. And are you also familiar with the area around 1133 Sixth Avenue? A. Yes, sir.

Q. And 220 West 42nd Street and 225 West 42nd Street? A. Yes, sir.

Q. Is that a crowded area? A. Yes, sir.

Q. Do you know how they refer to that area?

Mr. Glasser: Objected to.

By Mr. Rudman:

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Q. Is it known as the crossroads of the world? A. It is the Times Square area.

Q. Are you familiar with 1133 Sixth Avenue? A. I am not sure.

Q. Do you know where 220 West 42nd Street is? A. Yes, sir. It is between Seventh and Eighth Avenues.

Q. Are visitors from out of town usually present in that area?

Mr. Glasser: Objected to as too general.

The Court: Objection overruled.

Mr. Glasser: Exception.

By the Court:

Q. Do you know anything about it? A. Yes, sir. There are quite a few out of town people who visit the section.

By Mr. Rudman:

Q. Is it a theatre section? A. Yes, sir.

Q. Does it attract young as well as old people? A. Yes, sir.

Q. And does it attract teen-agers? A. Yes, sir. 110

Mr. Glasser: Objected to. This man is no expert on what it attracts.

The Court: Objection sustained.

By Mr. Rudman:

Q. Have you patroled that area? A. Yes, sir.

Q. Have you seen many teen-agers there? A. Yes, sir.

Q. When is the last time you were in that area, either as a patrolman or detective? 111

Mr. Redfield: Objected to as outside the issues of the case.

Mr. Rudman: Will it be conceded that this area, the Times Square area, is a high traffic area, attracting teen-agers, middle-aged persons and old people?

Mr. Redfield: I so concede, but I doubt the relevancy.

Mr. Glasser: Same objection.

Mr. Rudman: Will it be conceded that

112 *Motion to Amend Title and for Severance*

the Times Square area attracts visitors from out of town?

Mr. Redfield: Yes.

Mr. Glasser: Yes.

Mr. Rudman: That is all. The plaintiff rests.

The Court: We will take a recess now until 2 p.m.

(Whereupon, a recess was taken until 2 p.m.)

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AFTERNOON SESSION

2 P.M.

(Trial Continued.)

Mr. Rudman: The plaintiff moves to amend the title of the action insofar as the defendants Times Square Book Shop, Louis Finkelstein are concerned, by striking out "Times Square Book Shop" and inserting "Louis Finkelstein, doing business as

114 Times Square Book Shop."

The plaintiff further moves to amend the title of the action insofar as the defendants "Pelley Book Shop, Philip Pellegrino" are concerned by striking out "Pelley Book Shop" and naming "Philip Pellegrino" as the defendant doing business as Pelley's Book Shop.

The plaintiff further moves, as far as the action as against the defendant Anne Goldberg who is deceased and who was not served with process, the defendant moves to sever the action.

Motion to Amend Title and for Severance Stipulations 115

The plaintiff further moves to sever the action as against the defendants Publishers Outlet and Gordon Law, who were not served with process.

It is hereby stipulated by and among the counsel for the respective parties hereto as follows:

That by order to show cause dated September 10, 1954, the plaintiff moved this Court for a temporary injunction. 116

This order to show cause and the papers were served on September 10, 1954, returnable September 14, 1954.

On September 22, 1954, a temporary injunction order was signed by Mr. Justice William C. Hecht, Jr., for the relief requested, upon consent of the attorney appearing for the parties at that time.

The case was set for trial in Special Term Part 3 for November 4, 1954 and after adjournment was tried today.

The order to show cause signed by Mr. 117
Justice Edgar J. Nathan, Jr., dated September 10, 1954, and the order dated September 27, 1954, signed by Mr. Justice William C. Hecht, Jr. and the order dated September 22, 1954 signed by Mr. Justice William C. Hecht, Jr. may be deemed a part of the record of this trial.

It is hereby stipulated by and between and among the attorneys for the respective parties hereto that findings of fact and conclusions of law are waived. All briefs are to be submitted by noon of Friday, December 17, 1954.

118 *Motions to Dismiss Complaint*

It is hereby stipulated by and between and among the attorneys for the respective parties hereto that so much of Paragraph 2 of Section 22-A of the Code of Criminal Procedure which provides that "A decision shall be rendered by the Court within two days of the conclusion of the trial" is hereby waived.

Mr. Redfield: The defendant Kingsley Books, Inc. and Martin Kleinberg move to
119 dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendants in that we claim that Section 22-A of the Code of Criminal Procedure, which is the alleged source of authority for this action, is unconstitutional on its face and as applied herein in that it violates the due process clause of the 14th amendment to the Constitution of the United States because Section 22-A provides for a restraint upon publications and their distribution and thus is an
120 interference with the freedom of the press.

These defendants further move to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against these defendants, in that Section 22-A of the Code of Criminal Procedure and particularly Subdivision 3 thereof violates the Constitution of the State of New York, Article 1, Section 12, which protects persons against unreasonable seizure.

Furthermore, this same Section and Sub-

division violate the due process provisions of the 14th Amendment to the Constitution of the United States in that they provide for the seizure and destruction of books, thus additionally infringing upon the freedom of the press.

The Court: Decision reserved.

Mr. Glasser: On behalf of the defendant Louis Finkelsten, doing business as Times Square Book Shop, I move to strike out the entire testimony concerning Eugene Malleta and the Pilgrim Publishing Company or Pilgrim Press because the plaintiff has failed to connect it sufficiently with the defendants in this action. 122

The Court: Decision reserved.

Mr. Glasser: The defendant further moves to dismiss the complaint on the ground set forth by my colleague Mr. Redfield and further states that the plaintiff has utterly failed to prove that the books, volumes 1 to 14 of "Nights of Horror" are lewd, indecent and lascivious, has offered no evidence whatsoever. 128

The Court: Decision reserved.

Mr. Redfield: The defendants Kingsley Books and Martin Kleinberg wish to withdraw Paragraph 4 of their answer so far as it pertains to them and we so move.

The Court: Motion granted.

Mr. Redfield: The defendants Kingsley Books and Martin Kleinberg rest. We renew the motions made at the end of the plaintiff's case.

The Court: Decision reserved.

Mr. Glasser: At this time the defendant Louis Finkelstein, doing business as Times Square Book Shop, rests and makes the same motion as made at the end of the plaintiff's case.

The Court: Decision reserved.

Mr. Rudman: The plaintiff rests.

The Court: The motions to amend the title of the action and for a severance against the deceased defendant Anne Goldberg are granted.

125

Decision is reserved on the case as a whole.

Final submission by noon Friday, December 17, 1954.

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Stipulation as to Exhibits

COURT OF APPEALS

STATE OF NEW YORK

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Plaintiff-Respondent,

—against—

KINGSLEY BOOKS, INC., *et al.*,

Defendants-Appellants.

IT IS STIPULATED by and between the attorneys for the respective parties hereto that Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L and 1-M, consisting of Volumes I and II and Issues 3 through and including 14 of the publication known as "Nights of Horror", and Plaintiff's Exhibits 2, 3, 4 and 5, consisting of inventories of copies of the said publication need not be printed in the record of this case, but that the same may be handed up to the Court by any party upon the argument of the appeal.

Dated: New York, N. Y.
September 28, 1955

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defenants-Appellants

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

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Opinion by Levy, J.

(142 N. Y. S. 2d 735)

The Penal Law of this State has for some time made it a misdemeanor to sell or distribute "any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, phonograph record, picture, drawing, photograph, motion picture film, figure or image, or any written or printed matter of an indecent character", Penal
131 Law, §1141, subd. 1. More recently, the Legislature enacted section 22-a of the Code of Criminal Procedure, providing that, "The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles" as defined there and in section 1141 of the Penal Law, and in the event that a final judgment of injunction be issued, the judgment "shall contain a provision directing the person, firm or corporation [against whom the injunction is granted] to surrender to the sheriff of the county in which the action was brought any of the
132 matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same." The Code section provides further that the person authorized to maintain the action is the chief executive or legal officer in any city, town or village in the State, subd. 1. In the City of New York, the latter official would be the corporation counsel.

Pursuant to section 22-a, the plaintiff, as Corporation Counsel of the City of New York, has instituted this action against a number of persons, firms and corporations, for the purpose of

(1) permanently enjoining the defendants from acquiring, selling or distributing any of the issues of a series of booklets entitled "Nights of Horror"; (2) directing the defendants to surrender to the Sheriff of the County of New York all issues of the publication within their possession and control, and (3) directing the Sheriff to seize and destroy them. Those defendants who have answered deny the allegation of the complaint that the publication is obscene, and in effect interpose three separate defenses: that 134
the plaintiff lacks the required legal authority to maintain this action; that section 22-a is an unconstitutional restraint on freedom of the press; and that section 22-a violates the constitutional protection against unreasonable seizures. This case has been considered by the parties, and found by the court, to be the first submission of the constitutional issues thought to be involved in the application of section 22-a. (The statute is set forth in the margin).*

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* Code of Criminal Procedure, section 22-a, as amended L. 1954, c. 702, eff. July 1, 1954: 135

"The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

"1. The chief executive of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecedent character, which is obscene, lewd, lascivious, filthy, indecedent or disgusting, or which contains an article or instrument of indecent or immoral use

The act of obscenity has been an offense against the public order for centuries (see Sir Charles Sydlyes Case, 1 Keble 620 [K.B. 1663]; Harris and Wilshere's Criminal Law, 16th ed., pp. 169-170; 1 Bishop on Criminal Law, 9th ed., §§500, 504; Alpert, Judicial Censorship of Obscene Literature, 52 Harv.L.Rev. 40-43). Printed obscenity has been deemed a crime at common law for generations. Commonwealth v. Holmes, 17 Mass. 336; see Grant and Angoff, Massa-
137 chusetts and Censorship, 10 Boston Univ.L.Rev. 52-56. The essence of the statute now known as section 1141 of the Penal Law was first enacted in the State of New York in 1881, Penal Code, §317. "It is to be observed that the statute [then Penal Code, §317] does not undertake to define obscene or indecent pictures or publications. But

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or purports to be for indecedent or immoral use or purpose; or or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribu-
138 tion or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecedent character, herein described or described in section eleven hundred forty-one of the penal law:

"2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

"3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in

the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning." People v. Muller, 96 N. Y. 408, 410.

The fact that the mores of the times change from one generation to another, or that they are not the same in every land and clime, does not render the statutory definition meaningless. See Learned Hand, J., in United States v. Kennerley, D. C., 209 F. 119, 121. Of course, 140
to be constitutionally valid, what is statutorily interdicted "must be defined with appropriate definiteness." Pierce v. United States, 314 U. S. 306, 311, 62 S. Ct. 237, 240, 86 L. Ed. 226. Thus it is that "immoral" Superior Films, Inc., v. Department of Education, 346 U. S. 587, 74 S.

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which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

"4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall 141
not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

"5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

[1] So in enrolled bill. Second "or" probably should be omitted.

[2] By stipulation entered upon the record, the parties duly waived this requirement, and the court therefore did

Ct. 286, 98 L. Ed. 329, reversing Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 113 N. E. 2d 502, "'injurious to public morals'" Musser v. State of Utah, 333 U. S. 95, 68 S. Ct. 397, 398, 92 L. Ed. 562, and "collections of criminal deeds of bloodshed or lust", Winters v. People of State of New York, 333 U. S. 507, 513, 68 S. Ct. 665, 669, 92 L. Ed. 840, have been held to provide no reasonable, ascertainable standards. In order for the Legislature to achieve
143 reasonable certainty—within constitutional limitations—it is not, however, necessary that the language be narrowed in such a manner as to allow no flexibility; rather, ordinary terms may be used to express ideas which adequately describe that which is prohibited when measured by the modes of common usage and understanding in the community. Sproles v. Binford, 286 U. S. 374, 393, 52 S. Ct. 581, 76 L. Ed. 1167; Jordan v. De George, 341 U. S. 223, 231-232, 71 S. Ct. 703, 95 L. Ed. 886.

Repeated challenges to the definiteness of the
144 term "obscene" have been rejected. Chaplinsky v. State of New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 347, 121 N. E. 2d 585; Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324-350. There is no question but that the term "obscene" is sufficiently definite to be used—even in a criminal statute. Winters v. People of State of New York, 333 U. S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840. "The Legislature has declared in this section [Penal Law, §1141] that no obscene, [illegible] or disgusting book shall be sold,

Language could not be plainer." Crane, J., dissenting, in Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 14, 136 N. E. 219, 223. And while it has been thought, United States v. Reese 92, U. S. 214, 23 L. Ed. 563, that it is not necessarily a basis for vital distinction that a statute imposes no criminal sanctions (and that is true of section 22-a, although it is incorporated in the Code of Criminal Procedure), it is recognized that "[t]he standards of certainty in statutes punishing for offenses is higher than in 146
those depending primarily upon civil sanction for enforcement." Winters v. People of State of New York, 333 U. S. 507, 515, 68 S. Ct. 665, 670, 92 L. Ed. 840.

Some of the defendants have denied that the publications fall within the proscription of section 22-a. The classic legal test for obscenity is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (Regina v. Hicklin, L. R. [1868] 3 Q. B. 360, 147
371). This definition, expressed long ago, seems rather strict and has been often criticized. United States v. One Book Called "Ulysses", D. C., 5 F. Supp. 182, affirmed United States v. One Book Entitled Ulysses by James Joyce, 2 Cir., 72 F. 2d 705; United States v. Levine, 2 Cir., 83 F. 2d 156; United States v. Dennett, 2 Cir., 39 F. 2d 564, 76 A. L. R. 1092; United States v. Kennerley, D. C., 209 F. 119; Ernst and Lindey, The Censor Marches On, pp. 2, 22, 188; Buchsbaum, Constitutional Law—Censorship—Statutory Construc-

148 be the standard sustained by our Court of Appeals, People v. Doubleday & Co., Inc., 297 N. Y. 687, 77 N. E. 2d 6, affirmed 335 U. S. 848, 69 S. Ct. 79, 93 L. Ed. 398; People v. Muller, 96 N. Y. 408, 411; People v. Berg, 241 App. Div. 543, 272 N. Y. S. 586, affirmed 269 N. Y. 514, 199 N. E. 513; but see People v. Wendling, 258 N. Y. 451, 453, 180 N. E. 169, 81 A. L. R. 799.

The only question before the court in Besig v. United States, 9 Cir., 208 F. 2d 142, was 149 whether the books were obscene. Obscene was defined, Id., at page 145, as "indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions * * *." The court found the books in that case to be just that, and the language therein "related without the slightest expressed idea of its abandon." (ibid.) Judge Stephens felt that not only must the young and pure be protected, but that the Congress must have realized, when the statute there involved [19 U. S. C. A. §1305(a)] was passed, "that salacious print in the hands of 150 adults, even in the hands of those whose sun is near the western horizon, may well incite to disgusting practices and to hideous crime." 208 F. 2d at page 146. The court continued: "We share the general antipathy to censorship and we are aware that individual tastes and special occasions and different times and different peoples differ as to what is offensive language. Yet we risk the assertion that there is an underlying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposefully flaunt [flout?] * * * come under the ban of the

In determining what is obscene in any particular case, "[t]he law will not hold the crowd to the morality of saints and seers" (Cardozo, Paradoxes of Legal Science, p. 37). Neither will the law honor the views of the bestial and the debased. Nor should it be governed by the morals of the prude on the one hand or of the perverted on the other. "All that we can say is that the line will be higher than the lowest level of moral principle and practice, and lower than the highest." (Cardozo, supra, p. 37.) Sex relationships 152
can be and normally are beautiful, profound, inspiring and healthy. And some of the finest literature of all time—of fact and fancy, lasting and cherished through the ages—has presented and discussed, analyzed and novelized the concept of sex. Not so the present publications. If ever there could be found appropriate applicability for section 22-a, this case emerges as the perfect example of what the Legislature has sought to curb. Judge Learned Hand felt that the word "obscene" should "be allowed to indicate the present critical point in the compromise between candor 153
and shame". United States v. Kennerley, D. C., 209 F. 119, 121. No such problem is here presented; for "Nights of Horror" will be found resting at the foot of the scale, clearly marked "shame". No matter how strict the test or how broad the criteria, these volumes will readily measure up to and even surpass the most generous standard. The booklets in evidence offer naught but glorified concepts of lustful and vicious concupiscence, and by their tenor deride love and virtue, invite crime and voluptuousness, and excite lecherous desires. See People v.

170, 81 A. L. R. 799. There is no true dissemination of lawful ideas—rather is there a direct incitement to sex crimes and the sordid excitement of brutality. These booklets are sold indiscriminately to all who may wish to purchase them—men and women, adults and youths of both sexes. The publications have a libidinous effect upon ordinary, normal, healthy persons; their effect upon the abnormal individual may be disastrous to him and to others as well.

155 These booklets are not sex literature, as such, but pornography, unadulterated by plot, moral or writing style. That there is no attempt to achieve any literary standard is obvious. Each issue is a paper-covered booklet of from 70 to 96 pages, with a suggestive sex drawing on the front cover under the caption "Nights of Horror". The price varies from $1.98 to $3.00 per issue. The volumes are replete with mispelled words, typographical errors, faulty grammar, misplaced pages and generally poor workmanship. While these factors do not, of course, classify the issues as pornographic, they are 156 somewhat helpful in ascertaining whether there truly exists a genuine literary intent. "Nights of Horror" makes but one "contribution" to literature. It serves as a glossary of terms describing the private parts of the human body (notably the female breast, buttocks and vagina), the emotions sensed in illicit sexual climax and various forms of sadistic, masochistic and sexual perversion. The volumes before me are not a description of a period of history or the people and character of an earlier time and of their conduct and habits of life. They are not a relating of folk tales or stories of primitive people living

in isolated regions. They do not purport to depict the lives and customs of those who are here now or are expected to inhabit this land or this earth in the time to come: See People v. Berg, 241 App. Div. 543, 544, 272 N. Y. S. 586, 587, affirmed 269 N. Y. 514, 199 N. E. 513.

"Nights of Horror" is no haphazard title. Perverted sexual acts and macabre tortures of the human body are repeatedly depicted. The books contain numbers of acts of male torturing female and some vice versa—by most ingenious means. 158
These gruesome acts included such horrors as cauterizing a woman's breast with a hot iron, placing hot coals against a woman's breasts, tearing breasts off, placing hot irons against a female's armpits, pulling off a girl's fingernails with white-hot pincers, completely singeing away the body hairs, working a female's skin away from her flesh with a knife, gouging and burning eyes out of their sockets, ringing the nipples of the breast with needles. Hanging by the thumbs, hair pulling, skin burning, putting on bone-compressing iron boots, were usual. The torture rack abounded. Self-torture was frequent. Sucking a 159
victim's blood was pictured; and so was pouring molten lead into a girl's mouth and ears; and putting honey on a girl's breasts, vagina and buttocks—and then putting hundreds of great red ants on the honey. Sodomy, rape, lesbianism, seduction prevail. Youngsters disrobing in the presence and to the detailed recorded delight of elderly males was described. Incidental training of the teen-ager to narcotic addiction and sexual perversion was part of the activities engaged in. The volumes expressed a philosophy of man's

omnipotent physical power over the female of the species. On occasion, the young woman is said to have gained satisfaction from the brutal beatings and horrible tortures. If she did not enjoy them, she received the beatings and tortures anyway—until she submitted to the sex acts desired by her tormentor. These brutalities were "my supreme pleasure" to the male, and resulted in "I'll be your slave" to the female. (It is not to be taken that I have, in any measure, given
161 a complete report of the "Nights of Horror". I felt that I had to mention some not the most sordid, features of this publication in view of the serious issues raised in this case—but I need not, I think, describe all I was compelled to read.)

While it appears, as a study of earlier cases will indicate, that some courts have held a publication obscene on the basis of selected passages, United States v. Bennett, Fed. Cas. No. 14,571, 16 Blatchf. 338; Commonwealth v. Friede, 271 Mass. 318, 171 N. E. 472, 69 A. L. R. 640; Commonwealth v. Buckley, 200 Mass. 346, 86
162 N. E. 910, 22 L. R. A., N. S., 225, each volume here was read (a distasteful task, it turned out to be—to say the least) to determine whether, taken as a whole, it was obscene within the proscription of the statute. Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 4, 136 N. E. 219, 220; Bisig v. United States, 9 Cir., 208 F. 2d 142, 146; Commonwealth v. Isenstadt, 318 Mass. 543, 548-549, 62 N. E. 2d 840; United States v. "One Book Called "Ulysses", D. C., 5 F. Supp. 182, 185, affirmed United States v. One Book Entitled Ulysses by James Joyce, 2 Cir., 72 F. 2d 705; Roth v. Gold-

man, 2 Cir., 172 F. 2d 788, 790, Frank, J., concurring. Suffice it to say at this point that there is not a single "story" which is not "obscene, lewd, lascivious, filthy, indecent or disgusting."** More often than not these adjectives must be used in combination, and with many others in the same vein, to describe adequately any one issue. The whole here is "emetic" and "aphrodisiac". See United States v. One Book Called "Ulysses", D. C., 5 F. Supp. 182, 185.

The authors have left nothing to fantasy or 164
to the unimaginative mind. The volumes are vividly detailed and illustrated. The many drawings that embellish these stories are obviously intended to arouse unnatural desire and vicious acts. Violence—criminal; sexual—degradation and perversion—are the sole keynote. Sadism and masochism are pictured as appropriate characteristics of human nature and pleasure. In short, the volumes of "Nights of Horror" in evidence before me are obscene and constitute pornography—"dirt for dirt's sake", United States v. One Book Called "Ulysses", D. C., 5 165
F. Supp. 182, 184, bestiality, lust, crime, horror, for their unfortunate sake—and for the ugly sake of filthy commerce in human weakness. Anne Lyon Haight has compiled a revised and enlarged edition of "Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places" (2d ed., 1955). This chronological list of books banned from 387 B.C. to 1954 A.D. (with no attempt to be all inclusive) was compiled with

** From time to time throughout this opinion, for purposes of convenience, I use the single word "obscene" rather than the several words of the statute.

the idea of showing the trend of censorship throughout the years and the change in thought and taste. Most of the books there recorded fall under a ban because of religion, politics or morality, making the offense one of heresy, treason or obscenity. Among them are books which have withstood the condemnation of their immediate times to become the classics of today. "Nights of Horror" does not deserve to be listed among the missing when the next edition
167 of "Banned Books" is published.

It is urged by all of the contesting defendants that, notwithstanding any determination that I make as to the obscene character of "Nights of Horror", section 22-a is unconstitutional on its face and therefore void. It is contended, firstly, that the statute violates federal and state constitutional guarantees against interference with a free press; and, secondly, that in part it violates constitutional protections against unlawful seizures. I shall examine these points separately.

168 The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press". The First Amendment is applicable to the several states via the due process clause of the Fourteenth Amendment. Gitlow v. People of State of New York, 268 U. S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138; Near v. State of Minnesota, 283 U. S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357; Grosjean v. American Press Co., Inc., 297 U. S. 233, 249, 56 S. Ct. 444, 80 L. Ed. 660. Article I, Section 8, of the Constitution of the State of New York, provides that "Every citizen may freely speak, write and publish his

sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Each of these constitutional provisions is a grave mandate requiring sincere and primary recognition when legislation is challenged as running afoul of their powerful protection, and, in my view, compels devoted judicial obeisance.

No doubt, "the rights of the best of men are secure only as the rights of the vilest and most 170
abhorent are protected." Pound, J., dissenting, in People v. Gitlow, 234 N. Y. 132, 158, 136 N. E. 317, 327, affirmed 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138. And no doubt, too, the rights of the best of books are dependent upon the judicial protection to be afforded those having the least social value. Indeed, even publications of no social worth are entitled to be shielded from unlawful or unconstitutional restraint. Winters v. People of State of New York, 333 U. S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840. Were "The Nights of Horror" works which indicated the slightest 171
effort to contribute to our culture or knowledge, I might find myself in the position of "holding my nose with one hand" and "upholding with the other the right of free speech" that they are claimed to represent (see Judge Curtis Bok, "If We are to Act Like Free Men", Saturday Review, Feb. 13, 1954, p. 9, at p. 10, col. 3). But the volumes before me are so totally lacking in merit, and so obviously pornographic in intent, that their banning poses no threat to freedom of expression in literature or otherwise. To borrow a thought from Judge Learned Hand, I can well say that the plea of the present defendants, in-

voking the sacred constitutional guaranty of free press, is an effort to "misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity". United States v. Kennerley, D. C., 209 F. 119, 121.

I would not want or (if I could avoid it) permit this court to become a licensor, a censor, a book-burner. But a judicial tribunal should not and cannot avoid its responsibility. "Publications found by fair process to violate literate,
173 adult and clearly defined standards of decency or other criminal safeguards can serve no useful purpose for the community, and [judicial?] interference with their dissemination we find nonobjectionable." (Report on Book Burning, Committee on the Bill of Rights, The Record of the Association of the Bar of the City of New York, Vol. 10, No. 3, March, 1955, p. 143).

At this point, I shall note two cardinal and basic tenets for my view that the statute is not vulnerable on the ground of an allegedly unconstitutional infringement of the freedom of the
174 press—that of "clear and present danger" and that of "no prior restraint". Let me delineate.

In cases involving fundamental human liberties—such as freedom of the press—there must (and properly should) be shown, before there may be a suppression, a "clear and present danger" of the substantive evils which the Legislature has a right to prevent, Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470; followed in Dennis v. United States, 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137; Thornhill v. State of Alabama, 310 U. S. 88, 105, 60 S. Ct. 736, 84 L. Ed. 1093, and the court has a

concomitant obligation to enforce. Police power may be exercised only when the public generally requires such interference and not to protect the interests of a particular class. Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385. The well-supervised adolescent and the well-disciplined adult are not those whom all law must be designed to shield. It cannot, I think, seriously be gainsaid that the public generally does have a vital interest in shielding the immature mind (of whatever age) from lust-stimulating and vice- 176
arousing pornography. There are numbers of our population who, although they have reach majority, harbor dormant criminal instincts that are easily aroused by the pornographic script, the violent narration and the indecent picture. It may be thought that to keep "Nights of Horror" from the young in years would require only legislation similar to those criminal laws regulating sale of alcoholic beverages, tobacco and firearms; but that appears to have been considered by the Legislature not to be enough— and not without some basis. (Nor, unfortunately, 177
have public education, religious training, parental guidance and psychiatric care been the complete solution.)

While section 1141 of the Penal Law was designed to punish the offenders, that has been found not to be sufficient (Report of the New York State Joint Legislative Committee to Study the Publication of Comics, Leg. Doc. [1954] No. 37, p. 32). The Penal Law provides for punishment of the guilty, but the susceptible public remains contaminated with pornographic filth and stimulation. So long as enforcement of this criminal law is not effective (for whatever

reason), and so long as publishers and distributors are willing to risk spasmodic misdemeanor convictions for the huge profits which apparently accrue from the exploitation of pornographic vice, section 22-a was deemed necessary. And if one is willing to risk (and unable to escape) repeated punishment for the sake of keeping an obscene publication alive, he could go to (and for a time remain in) jail, but his obscenity would survive. It was not considered in the best in-
179 terests of the State to have jail cells overcrowded, be it with publishers and distributors who have violated section 1141 of the Penal Law or with teen-agers and others whose latent abnormal emotions have become aroused by such lascivious and vicious material as that which makes up the "Nights of Horror". The legislative intent and purpose are to keep such books as the "Nights of Horror" from the impressionable public. While this court has sufficient confidence in the people of this state to feel that "Nights of Horror" can never survive, the immediate and
180 long-range public interests were thought by the Legislature to require that the death blow be hastened. The Legislative Committee found that "the reading of these publications contributes to juvenile delinquency, stimulates sexual desire, lowers standards of morality and interferes with the normal development of sexual tendencies in both adolescents and adults". (Report, supra, pp. 34-35). The Legislature held injunction and suppression to be the only effective means to combat such a malignancy. It is not for the court —on the evidence before me—to say that there is no basis for this legislative finding and that

the suggested remedy in these times is necessarily wrong. Indeed no evidence whatsoever was sought to be submitted by the defendants which would tend in any way to challenge or controvert the legislative finding.

I do not consider censorship generally in the best public interest; and I would take a different view of *literature* even though it contained matter involving sex and crime. But the proof submitted on behalf of the plaintiff, a reading of the several issues of the "Nights of Horror", 182
the studies and reports of the New York State Joint Legislative Committee to Study the Publication of Comics, of the Special United States Senate Judiciary Sub-Committee on Juvenile Delinquency, and of the Select Committee of the United States House of Representatives on Current Pornographic Materials, and our every-day observations of the shocking rise of juvenile delinquency and sex crimes—all these lead us more easily to read the scale of public interests which plead for the suppression of these publications. All these indicate such a clear and present danger 183
of substantive evils that, as a judge, I cannot ignore the cry unless the Constitution says I must. I do not find that it does. On the contrary, while there appears to be no case in point, I do cite what the Supreme Court of the United States had occasion to say in Chaplinsky v. State of New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are

certain well-defined and narrowly limited classes of speech, the prevention and punishment of which [have] never been thought to raise any Constitutional problem. These include the lewd and obscene * * *. [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." See also Ex parte Jack-
185 son, 96 U. S. 727, 736, 24 L. Ed. 877.

The defendants argue that section 22-a is an unconstitutional violation of free speech in that it enforces a "previous restraint" upon the dissemination of ideas. I do not agree. To assume, even arguendo, as the defendants do, that the Legislature may constitutionally provide that one who publishes obscene matter is subject to criminal prosecution and imprisonment, see Winters v. People of State of New York, 333 U. S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840; Chaplinsky v. State of New Hampshire, 315 U. S.
186 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031, and yet cannot be civilly enjoined from the continued distribution of that same matter, is indulging in a misapprehension as to what is really meant by "prior restraint"—and, on the basis of that misconstruction, is making a fetish of semantics rather than pleading a sound constitutional principle. I recognize that those concerned with freedom—and that, of course, includes the courts—have the responsibility of seeing to it that each individual book or publication, whatever its contents, price, or method of distribution, is dealt with in accordance with due process of law.

Adequate notice, judicial hearing, fair determination, are the essence of "due process" and this is what the statute here has assured. I am of the considered opinion that when the court—after an adversary hearing—is able to read and examine the publications objected to, and acts judicially to enjoin their distribution, it is apparent that there is no "previous restraint" in the genuine historical and constitutional sense of that term, compare the statutory plan described in Attorney General v. Book Named "Forever Amber", 323 Mass. 302, 81 N. E. 2d 663, and Attorney General v. Book Named "God's Little Acre", 326 Mass. 281, 93 N. E. 2d 819. 188

In the circumstances, the contention that there is here an unconstitutional prior restraint is invalid. Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625, 626, 75 L. Ed. 1357, relied upon so heavily by the defendants, is not a holding to the contrary. The Minnesota statute provided that a person who possessed or circulated " '(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical' " (Minn. Stats. 1927, §10123-1) was guilty of a nuisance which could be enjoined. The question before the Court did not involve the obscenity provision of the statute, but clause "b", relating to an alleged "scandalous and defamatory newspaper" known as "The Saturday Press". The Supreme Court of the United States included in its opinion several basic expressions which clearly differentiate its holding there from the one I am about to make in the case at bar. At pages 715-716 of 283 U. S., at page 631 of 51 S. Ct., the Court said: "The 189

The statute clearly imposes a prior restraint and was held void upon its face. The fact that provision is made (as is not unusual—see Article 78 of the Civil Practice Act) for a judicial review of the licensor's determination does not remove the permit feature from the sphere of a previous restraint. 310 U. S. at page 306, 60 S. Ct. at page 904. That is not this case. Section 22-a does not provide for a permit or a license; it does not require any application or fee. It does not suppress in advance what is to be published. The 194
Legislature has simply determined that what has long been recognized as criminal (section 1141 of the Penal Law) the Supreme Court may enjoin and abate in a civil suit (section 22-a of the Code of Criminal Procedure). Provision has been made at the very outset for judicial action in the sphere of recognized equity jurisdiction and jurisprudence. Injunctions and abatements—when decreed by the court after due notice and trial—are not a species of objectionable censorship but rather are judicial determinations of justiciable controversies.

I recognize, of course, that remedy by injunction against words is exceptional—and, in my view, should properly be reserved for those cases where the exigency is clear (see Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 666; Chafee, Free Speech in the United States, pp. 9-10). But there have been and are such cases, and injunctions against certain obnoxious utterances are not without authoritative precedent. To mention one type of such injunction—thoroughly litigated during recent decades—I need but refer to cases involving labor disputes in which it has been held

that it is within the recognized jurisdiction of a court of equity to restrain, under certain circumstances, the reiteration of false, misleading and fraudulent statements—notwithstanding the constitutional guarantees against infringement upon the rights of free speech and free press. See Nann v. Raimist, 255 N. Y. 307, 317, 174 N. E. 690, 694, 73 A. L. R. 669; cf. Schlesinger, A Summary and Critique of the Law of Peaceful Picketing in New York, 22 Fordham L. Rev. 20, 41-47;
197 Burstein, Picketing and Speech, 4 Labor Law Journal 791.

It may be that, in certain cases, it would be helpful to obtain the fair verdict of a jury of reasonable adults in the community as to whether any particular publication is or is not obscene within the meaning of the statute. No doubt a jury is generally better fitted than a court to determine whether some books are obscene. "Far better than we is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of
198 public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent." Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 6, 136 N. E. 219, 220.

Upon the application, in the case of a misdemeanor prosecution in the City of New York, the court may certify that it is reasonable that the charge be prosecuted by indictment—with the consequent effect that the trial be by jury, New York City Criminal Courts Act, §31, subd. 1(c). But the constitution of this State does not compel jury trials of misdemeanor charges, Art. VI, §18, and violation of section 1141 of the

Penal Law is a misdemeanor. That a jury is not ordinarily a part of the judicial tribunal in equity cases is well known. Jamaica Savings Bank v. M. S. Investing Co., Inc., 274 N. Y. 215, 221, 8 N. E. 2d 493, 495, 112 A. L. R. 1485. Yet, a jury trial of certain issues may be granted on the equity side of the court, or denied, in the exercise of the chancellor's discretion, Civil Practice Act, §430. No application for a jury trial was made here—perhaps because there can be no doubt that "Nights of Horror" is unquestionably 200
within the category of the obscene.

The corporation counsel has, however, gone beyond pleading for an injunction to restrain acquisition and distribution of what has been and is; he seeks to enjoin what he contends might be. He urges me to enjoin not only the "further sale" and "further distribution"—to use the precise language of the empowering statute, section 22-a—of the issues of obnoxious publication in evidence, but also the sale and distribution of later issues as well. The statute does not, in express terms, compel such a determination. 201
Only by implication and construction could it be said that the legislative prohibition was intended to cover not only a publication presently in existence, but one not yet in being and therefore not subject to judicial examination. I am of the view that to rule against a volume not offered in evidence would do just what the courts have held is constitutionally forbidden—that is, to impose an unreasonable prior restraint upon freedom of the press.

Our constitutional jurisprudence abounds with precedents denying unlawful previous restraints upon the cherished freedoms guaranteed by the

objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." And then the Court stated in 283 U. S. at page 716, 51 S. Ct. at page 631, that one of these exceptions is that "the primary requirements of decency
191 may be enforced against obscene publications" and that "[t]he security of the community life may be protected against incitements to acts of violence". And in the more recent case of Joseph Burstyn, Inc., v. Wilson, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (which struck down, as repugnant to the First and Fourteenth Amendments, a licensing statute with respect to motion picture films), the Court expressly reserved the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene
192 films." 343 U. S. at page 506, 72 S. Ct. at page 782.

Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is cited by the defendants as authority for the proposition that so-called censorship by the judiciary—even though action is based, as it is here, on due process and judicial determination—is just as impermissible as advance censorship by an administrative officer. That case deals with a statute forbidding solicitation for a religious cause without first obtaining a certificate from a designated official, who may withhold the permit if he determines that it is not a religious cause.

Constitution. Prior restraints have been held invalid not only in Near v. State of Minnesota, 283 U. S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357, but this basic doctrine of constitutional law has been applied in every area of the First Amendment: speech, press, assembly, and religion. Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (permit for use of sound trucks); Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280
203 (permit required to hold public worship meetings on street); Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (permit required for distribution of pamphlets); Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (permit required for solicitation of moneys for religious causes); Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (previous restraint on speech and assembly); Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280 (permit for use of park for holding meeting); Largent v. State of Texas, 318
204 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (permit for soliciting orders for books or various household articles); Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (distribution of hand bills); Schneider v. State of New Jersey (Town of Irvington), 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (distribution of pamphlets without permit); Grosjean v. American Press Co., Inc., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (tax on newspaper circulation); Superior Films, Inc., v. Department of Education, 346 U. S. 587, 74 S. Ct. 286, 98 L. Ed. 329, and Joseph Burstyn, Inc., v. Wilson, 343 U. S. 495,

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72 S. Ct. 777, 96 L. Ed. 1098 (vague general standard in pre-licensing of motion pictures). The Court of Appeals of New York spoke out on this subject as early as 1839, Brandreth v. Lance, 8 Paige 24, but the most articulate pronouncement was not to be heard until Chief Justice Hughes' opinion in 1931 in Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357. There, the United States Supreme Court declared invalid a state statute as a previous restraint upon the freedom of the press as guaranteed by the First and Fourteenth Amendments. Since the injunction in that case sought to suppress future issues of a periodical (found to have been defamatory in the past), it was held that the decree was too broad as an unreasonable restraint upon the press, and that either civil or criminal libel after publication would have afforded an adequate remedy.

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Since there cannot possibly be an assurance that a future issue would necessarily be obscene, the requested advance suppression of what might be seems (at least to me) to be violative of the constitutional right of free press. Be that as it may, it is an established principle of our law that a statute must, if possible, be so construed as to be constitutional, Crowell v. Benson, 285 U. S. 22, 46, 52 S. Ct. 285, 76 L. Ed. 598; Panama Railroad Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408, 29 S. Ct. 527, 53 L. Ed. 836; Kauffman & Sons Saddlery Co., Inc. v. Miller, 298 N. Y. 38, 44, 80 N. E. 2d 322, 324, and even to avoid, if possible, raising substantial constitutional questions. See Peters v. Hobby, 75 S. Ct. 790; Kupferman and O'Brien,

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Motion Picture Censorship—The Memphis Blues, 36 Cornell L. Q. 273, 278-280. Had the legislation now under attack offered the entire scope of relief sought by the plaintiff (i.e. the injunction against all future issues), it would, I sense, raise serious constitutional questions.

In consequence it follows that there can be no injunction regarding an unpublished book or pamphlet—however likely it may be thought that it will, when issued, be violative of the statute.
209 Unless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.

The defendants also contend (without argument or citation) that the judgment which I am about to render would amount to an unconstitutional seizure, U. S. Const. Amend. IV; N. Y. Const. Art. I, sec. 12. I hold this claim to be
210 wholly without merit.

The prohibition against "unreasonable searches and seizures" does not, I take it, forbid judicially declared action based upon constitutionally authorized jurisdiction—and duly taken thereunder, cf. Matter of Both, 200 App. Div. 423, 192 N. Y. S. 822—but rather against certain action sans due judicial sanction. A court of equity, I have now held, may constitutionally be given power to enjoin the sale and distribution of existing obscene publications. I do not see wherein it may not also validly be given jurisdiction concomitant therewith to compel the surrender and

destruction of such publications. The law books are not without analogies, although I found no precise precedents one way or the other.

Replevin is an ancient legal remedy. The abatement of a nuisance has long been known in the field of equity jurisprudence. When a person is legally arrested, he may be searched to discover and seize the fruits of his crime, see Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652; People v. Chiagles, 237 N. Y. 193, 195, 142 N. E. 583, 32 A. L. R. 676; so, 212
too, it may be said that when a "res" is lawfully "arrested", and permanently condemned, the Legislature may authorize its seizure and destruction. Constitutional immunity is granted not from all searches and seizures, but only from those which are "unreasonable", U. S. Const. Amend. IV; N. Y. Const. Art. I, sec. 12; Civil Rights Law, §8; People v. Richter, 265 App. Div. 767, 771, 40 N. Y. S. 2d 751, 754, affirmed People v. Richter's Jewelers, Inc., 291 N. Y. 161, 51 N. E. 2d 690, 150 A. L. R. 560. As Judge Cardozo reasoned in another connection, "the fact that 213
the weapon was contraband, a nuisance subject to destruction * * * might have justified the seizure, the abatement of the nuisance, if the weapon had been exposed to view." People v. Defore, 242 N. Y. 13, 18, 150 N. E. 585, 586, certiorari denied 270 U. S. 657, 46 S. Ct. 353, 70 L. Ed. 784. Firearms and slot machines, for example, have, under certain circumstances, been declared "public nuisances" by the Legislature, and subject to seizure and destruction. As such, they may, after due notice and fair trial, be seized and abated without violating constitution-

214 *Opinion by Levy, J.*

al guarantees. Penal Law, §§982-985, 1899; People v. Whitcomb, 273 App. Div. 610, 79 N. Y. S. 2d 230, appeal denied 274 App. Div. 851, 81 N. Y. S. 2d 923, appeal dismissed 298 N. Y. 635, 82 N. E. 2d 30; People v. Defore, supra. The Legislature has now also classified "obscene" matter as "contraband", and determined that it may be seized and destroyed in pursuance of court decree after an open trial, Code Cr. Proc. §22-a. I hold that the classification is justifiable,
215 that the defendants have been fully and fairly heard, that there is due process of law, and that "seizure" is reasonable and not violative of the constitution.

Specious, too, in my view, is the defendants' challenge directed to the plaintiff's capacity to sue. Section 22-a specifically provides, sub-section 1, that "the [corporation counsel] of any city * * * in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any * * *
216 [proscribed printed matter] may maintain an action for an injunction * * * in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of" that matter.

The Charter of the City of New York provides for the appointment of a corporation counsel by the mayor, Section 391. Section 394, subd. a, of the Charter reads: "*Except as otherwise provided by law,* the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all

the law business of the city and its agencies and *in which the city is interested.*" (Emphasis supplied.) In Section 30 of the City Home Rule Law; the Legislature specifically reserved to itself the power "to pass laws regulating *matters of state concern*" (emphasis supplied); See also Article 9 of the State Constitution).

I hold that Section 22-a of the Code of Criminal Procedure is an instance in which "otherwise" was "provided by law". In addition, what may be "matters of state concern" may also be something "in which the city is interested." The 218
publication and distribution of material devoted to obscenity, lewdness, lasciviousness, filth, indecency and disgust—to crime, sex, horror, terror, brutality, lust and depravity—have been found by the Legislature to be a contributing factor to juvenile delinquency, a basic factor in impairing the ethical and moral development of our future citizens, and a clear and present danger to the people of our State. As such, these are, it seems to me, "matters of state concern" "in which the city is [also] interested." 219

Judgment is rendered in the plaintiff's favor on the merits to the extent herein indicated. The defendants*** will be permanently enjoined from distributing, selling or acquiring possession of

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*** Since the institution of this action, Adrian P. Burke resigned as Corporation Counsel of the City of New York, and Peter Campbell Brown, thereafter duly appointed Corporation Counsel, is substituted as plaintiff in his stead.

On motion of the plaintiff the title of the action is also amended, with respect to certain of the defendants, as follows: (1) "Louis Finkelstein, doing business as Times Square Book Shop", instead of "Times Square Book Shop, Louis Finkelstein", and (2) "Philip Pellegrino,

any of the volumes of the publication entitled "Nights of Horror" received in evidence upon the trial, and they will be directed to surrender to the Sheriff of the City of New York (New York County Division) all copies of these volumes now in their possession, and the Sheriff will be directed to seize and destroy them. Settle judgment accordingly. The parties having duly waived findings of fact and conclusions of law, this opinion will constitute the decision of the court in pursuance of the provisions of the Civil Practice Act.

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doing business as Pelley Book Shop" instead of "Pelley Book Shop, Philip Pellegrino".

The defendants Metropolitan Book Shop Inc., and Philip Pellegrino did not appear, although served with process. The defendant Anne Goldberg was not served with process and is deceased. The defendants Publishers Outlet and Gordon Law were not served with process.

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Stipulation Settling Case

IT IS HEREBY STIPULATED that the foregoing case contains all the evidence given upon the trial of this action, and the same may be settled and ordered to be filed and annexed to the judgment roll herein.

Dated: New York, N. Y.
October , 1955.

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defendants-Appellants

224

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

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Order Settling and Filing Case

On the above stipulation the foregoing Case on Appeal containing all the evidence, is hereby settled and ordered on file.

Dated: New York, N. Y.
October , 1955.

MATTHEW J. LEVY
J. S. C.

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Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notices of Appeal, Judgment Roll and Case and Exceptions as settled, and the whole now on file in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

230

Dated: New York, N. Y.
October , 1955.

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defendants-Appellants

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

231

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

[fol. 79] Clerk's and Judge's Certificates to foregoing paper omitted in printing.

[fol. 80] In the Circuit Court of Appeals of New York

Peter Campbell Brown, Corporation Counsel of the City of New York, Respondent

v.

Kingsley Books, Inc., et al., Appellants, and Metropolitan Book Shop, Inc., et al., Defendants

Opinion—Decided April 27, 1956

Fuld, J. Although we are all agreed for affirmance, we reach that conclusion by somewhat different routes. The importance and perplexities of the constitutional issue presented persuade me that there must be more full discussion than some of my associates believe necessary of the reasons for and the reach of the decision being made.

[fol. 81] Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces "any book, magazine, pamphlet, comic book, story paper, writing paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting". It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who "sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute" any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order of judgment must direct the defendant to

"surrender" the offending matter to the sheriff who "shall be directed to seize and destroy the same" (subd. 3).

The present suit, instituted by the Corporation Counsel of the City of New York against a number of book sellers with premises in that city, concerns a series of paper-bound booklets collectively entitled "Nights of Horror". Members of the police force testified at the trial that the booklets had been displayed for sale in defendants' stores and that they had purchased a number of copies from the various defendants, at prices ranging from $2 to $4 each. The publications themselves were also introduced in evidence. The trial judge, in a carefully considered opinion, found that the booklets were plainly obscene and pornographic, "dirt for dirt's sake", and held that the statute did not violate any constitutional guarantee. He thereupon granted judgment (1) permanently enjoining defendants from distributing, selling, or acquiring possession of such publications, (2) requiring them forthwith to surrender to the sheriff for destruction all copies in their possession and (3) directing the sheriff to seize and destroy such copies, in the event of defendants' failure to surrender them.

The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy. Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the Penal Law, no constitutional argument could successfully have been leveled against resulting convictions. Indeed, not questioning the definiteness of the [fol. 82] statutory standard, not challenging the test of obscenity applied by the trial judge, who concluded that the booklets were obscene under any of the judicially announced criteria and not objecting to the failure to require a jury trial,[1] defendants' sole attack upon the statute is

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[1] It may be well to note that in a criminal prosecution based upon section 1141 of the Penal Law, involving as it does a misdemeanor charge, the defendant is not entitled to a trial by jury as a matter of constitutional right. (N. Y. Const., art. VI, § 18; see *People* v. *Kaminsky*, 208 N. Y. 389, 394; *People ex rel. Cosgriff* v. *Craig*, 195 N. Y. 190, 195-196; see, also, N. Y. City Crim. Cts. Act, § 31; subd. 1, pars. [b], [c].)

that the remedy by injunction constitutes an unconstitutional "prior restraint," interfering with freedom of speech and press (U. S. Const., 1st and 14th Amendts.; N. Y. Const., art. I, § 8).[2]

There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501-502; see, also, Chafee on Free Speech in the United States [1941], p. 545), that it protects distribution as well as initial publication (see *Lovell* v. *Griffin*, 303 U. S. 444; *Grosjean* v. *American Press Co.*, 297 U. S. 233) and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas. (See *Winters* v. *New York*, 333 U. S. 507, 510; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 153.) While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 502-504; *Feiner* v. *New York*, 340 U. S. 315, 319; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Winters* v. *New York*, *supra*, 333 U. S. 507, 509; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98, 105.)

That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter,[3] at least by the application of criminal sanc-

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[2] We do not concern ourselves with the further provision of the statute directing the court to render its decision "within two days of the conclusion of the trial" (subd. 2), in view of the fact that the parties agreed neither to invoke nor insist upon that requirement.

[3] It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See e.g., Jahoda and Staff of Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)

[fol. 83] tions is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court (see *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd., by equally divided court, 335 U. S. 848; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Pesky*, 254 N. Y. 373; *People* v. *Muller*, 96 N. Y. 408) and by the United States Supreme Court. (See *United States* v. *Alpers*, 338 U. S. 680; *Winters* v. *New York*, *supra*, 333 U. S. 507, 510, 518, 520; *United States* v. *Limehouse*, 285 U. S. 424; see, also, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Beauharnais* v. *Illinois*, 343 U. S. 250 266.) Imprecise though it be—its "vague subject-matter" being largely "left to the gradual development of general notions about what is decent" (per L. HAND, J., *United States* v. *Kennerley*, 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard. Indeed in the *Winters* case (*supra*, 333 U. S. 507), the court not only indicated that collocation of the very words found in section 1141 of our Penal Law, "obscene, lewd, lascivious, filthy, indecent or disgusting", is sufficiently "well understood through long use in the criminal law" to satisfy the due process requirements of definiteness and certainty (333 U. S. at p. 518), but actually pointed to the provisions as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications" (333 U. S., at p. 520).[4]

Thus, by virtue of section 1141, it has long been a misdemeanor in this state, punishable by imprisonment or fine or both, to sell or distribute any written or printed obscene material of the kind described in section 22-a of the Code, and similar statutes are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chicago L. Rev. 216). The legislature, however, apparently concluded that

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[4] Application of the standard may, perhaps, raised constitutional questions in individual cases (cf. *Doubleday & Co.* v. *New York*, 335 U. S. 848, affg., by equally divided court, 297 N. Y. 687, *supra*; *Roth* v. *Goldman*, 172 F. 2d 788, 792, per FRANK, C. J., concurring; see Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295), but the present is not such a case.

such penal sanctions were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised. (Cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, N. Y. Legis. Doc., 1954, No. 37, pp. 31-32.) Whether or no the legislature acted wisely is, of course, no concern of the courts. Our inquiry is limited to whether its act transcends constitutional limits.

[fol. 84] As already noted, no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the Penal Law. What the statute does is to provide an additional sanction against the dissemination of obscene matter.

It is, however, defendants' position that the constitution limits the state to the imposition of punishment, and that distribution of the writing itself may not be prevented. An injunction, such as the present one, even though it is issued after publication and after a judicial trial, is characterized as such suppression and censorship as to stamp it an impermissible "prior restraint." In other words, it is urged that as long as the publisher or vendor of a writing is willing to risk the imposition of criminal penalties he has an absolute right to proceed with its publication or distribution and any restriction of that right is unwarranted, since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The major, though not exclusive, purpose of the guarantee of free expression is "to prevent previous restraints upon publication." (*Near* v. *Minnesota, supra,* 283 U. S. 697, 713; *Joseph Burstyn, Inc.* v. *Wilson, supra,* 343 U. S. 495, 503.) Though difficult of exact formulation (see Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems 648), this principle of immunity from prior restraint has been applied by the United States Supreme Court in a variety of situations to strike down li-

censing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion. (See, e.g., *Poulos* v. *New Hampshire*, 345 U. S. 395; *Kunz* v. *New York*, 340 U. S. 290; *Niemotko* v. *Maryland*, *supra*, 340 U. S. 268; *Cantwell* v. *Connecticut*, *supra*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147.) As has been pointed out, however, "the protection even as to previous restraint is not absolutely unlimited", although the limitation has been recognized "only in exceptional cases". (*Near* v. *Minnesota*, *supra*, 283 U. S. 697, 716; *see, also, Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 504.)

The Supreme Court has asserted, by way of dictum, that the control of obscenity presents such an exceptional case. In *Near* v. *Minnesota* (*supra*, 283 U. S. 697, 716), Chief Justice HUGHES, in discussing certain extraordinary areas exempt from the sweeping prohibition against prior restraint, stated that one of the exceptions was that "the primary requirements of decency may be enforced against [fol. 85] obscene publications", and similar reservations have also been expressed elsewhere. (See *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 571-572, *Lovell* v. *Griffin*, *supra*, 303 U. S. 444, 451; see, also, Chafee, *op. cit.*, p. 10.) But the precise issue whether restraints in advance of publication may be applied to obscene matter has not yet been squarely decided. Questions involving the validity of state systems of censorship of motion pictures have on several recent occasions come before the Supreme Court, but in each instance the case has been disposed of by striking down some particular standard or criterion on the ground that it did not satisfy the minimum requirements of definiteness and certainty. (See *Superior Films* v. *Department of Educ.*, 346 U. S. 587; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; cf. *Holmby Productions* v. *Vaughn*, 350 U. S. 870.) The court has specifically left open the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."

(*Joseph Burstyn, Inc.* v. *Wilson*, *supra*, 343 U. S. 495, 505-506.) [5]

We are not, in my opinion, required in this case to decide categorically the validity, under all circumstances, of any and every prior restraint aimed at obscene matter, regardless of the nature and scope of the regulatory measure employed or of the particular medium of expression involved. While strong objections have been voiced against any practice of general censorship, even in the area of obscenity, and whether administered by an executive agency or a judicial tribunal (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 661, 670-671; Rice, The Supreme Freedom: Three Hundred Years After Milton, pp. 105, 111-112; contained in Great Expressions of Human Rights, edited by R. M. MacIver, published in 1950 by Institute for [fol. 86] Religious and Social Studies; cf. *Superior Films* v.

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[5] I do not believe that *Holmby Productions* (*supra*, 350 U. S. 870) answers this question. The Kansas statute there considered provided for the banning of any motion picture found by the state's board of review to be "obsence, indecent or immoral, or such as tend to debase or corrupt morals". The film, "The Moon is Blue", while labeled by the board as "obscene," as well as "indecent and immoral," was specifically condemned for the following stated reason: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme." The Supreme Court reversed the judgment of the Kansas high court which had accepted the board's interpretation of the statute as well as its determination (177 Kan. 728). It is our surmise that this decision of the Supreme Court—reflected in a *Per Curiam*, merely citing *Burstyn* (*supra*, 343 U. S. 495) and *Superior Films* (*supra*, 346 U. S. 587)—turned solely on the wide reach and the essential vagueness of the standard employed by the Kansas court. Since any film could apparently be banned as "obscene, indecent or immoral" if a sex theme predominated, the term "obscene" was no narrower, no more definite or certain, than the criteria previously stricken as too vague in the *Commercial Pictures* and *Superior Films* cases (*supra*, 346 U. S. 587).

Department of Educ., supra, 346 U. S. 587, 588, per Douglas, J., concurring), that broad question is not here presented. Sharp and precise lines cannot always be drawn between permissible and nonpermissible regulatory measures in the realm of expression. (See *Winters* v. *New York, supra,* 333 U. S. 507, 518; *Joseph Burstyn, Inc.*, v. *Wilson, supra,* 343 U. S. 495, 517-518, per Frankfurter, J., concurring.) Whatever might be said of a scheme of advance censorship directed against all *possibly* obscene writings, the case before us concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees. (Cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650-651.)

There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshhold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration, of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well as on the law (Civ. Prac. Act, § 584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling. (See Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660.)

In point of fact, examination of the operation and effect of section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if [fol. 87] not more so, to deter publication of an obscene work. (See Pound, *supra*, 29 Harv. L. Rev., at p. 651; Emerson, *supra*, 20 Law and Contemporary Problems, at p. 660.) In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement; and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt. These words are, of course, limited to the statute before us dealing with obscenity, and nothing here written is to be taken as sanctioning the injunctive process in dealing with other objectionable or antisocial material, such as libel.

The reliance which defendants place upon *Near* v. *Minnesota* (*supra*, 283 U. S. 697) is untenable. That case concerned a Minnesota statute which authorized the issuance of an injunction, in a suit to be brought in the name of the state, against the further publication of any newspaper or periodical adjudged to be "malicious, scandalous and defamatory".[6] Under the statute, any articles deemed to be derogatory to a public officer could be branded "malicious, scandalous and defamatory", if the publisher were unable to establish that they were true *and* "published with good motives and for justifiable ends" (283 U. S., at pp. 709-710). Once such an injunction was issued, resumption of any fixture printing was banned and punishable as a contempt, unless the publisher was able to satisfy the court as to the character of the new publication. The court would thus be constituted a censor to pass on the contents of future issues

[6] The same statute also authorized an injunction against the further publication of any newspaper or periodical adjudged to be "obscene, lewd and lascivious", but that portion of the statute was no involved in the case.

in advance of publication, and whether the publisher "would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling" (283 U. S., at p. 712). It was this feature of the law, particularly as applied to newspaper comment upon matters of public importance, upon ideas in the realm of political expression, that was regarded by the Supreme Court as "of the essence of censorship" and an unwarranted infringement on freedom of discussion (283 U. S., at p. 713).

The features condemned in *Near* are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writings here condemned are undredeemed by even an iota of idea content or of artistic worth. And, unlike the statute in *Near* which sanctioned a general and future restraint, there is here no restraint of any kind on the publication or distribution of [fol. 88] material to be written or produced in the future. The corporation counsel in the court below sought to have the statute read as authorizing an injunction against the sale and distribution, not only of any published work found to be obscene, but also of any future work in the same series. This the trial court very properly refused to do.

In short, careful analysis of the operation and effect of section 22-a, in relation to the basic aims and objectives of the constitutional guarantees, is convincing that the limited injunctive remedy here provided may not be condemned as a forbidden prior restraint. As a matter of fact, analogous decisions under the Federal Tariff Act of 1930 (Act June 17, 1930, ch. 497, tit. III, § 305; U. S. Code, tit. 19, § 1305) suggest that a measure which prescribes a penalty only after the challenged work has already been published does not involve any aspect of prior restraint at all. The Tariff Act thus provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter upon adjudication after trial that it is obscene. Although the constitutionality of these provisions has apparently never been passed upon by the Supreme Court, the lower federal

courts have uniformly either held [7] or assumed [8] the statute to be constitutional. Thus, in *United States* v. *One Obscene Book Entitled "Married Love"* (*supra*, 48 F. 2d 821), Judge WOOLSEY rejected the contention that the statute impinged on the right of freedom of the press, noting that it did "not involve the suppression of a book before it is published"; in the course of his opinion, he wrote (p. 822): "After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press."

It is further urged that even publications adjudged to be obscene cannot constitutionally be withheld from free circulation in the market place of ideas; that, apart from the rights of the publisher and vendor, the public itself has the right to read and examine whatever is published and to form its own opinion of a publication's value and propriety. But here, as in other situations, the question is one of balancing the several competing interests involved. As the Supreme Court has emphasized, in reference to the federal statute declaring obscene material nonmailable (35 U. S. Stat. 1129, U. S. Code, tit. 18, former § 334), there is no necessity "to satisfy all tastes, no matter how perverted." (*Hannegan* v. *Esquire, Inc.*, *supra*, 327 U. S. 146, 158.)

[fol. 89] In reaching the conclusion which I do, I assume, of course, that the statutory proscription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it "broadly as a whole" (*Halsey* v.

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[7] See *Besig* v. *United States* (208 F. 2d 142); *United States* v. *One Obscene Book Entitled "Married Love"* (48 F. 2d 821, 822).

[8] See *Parmelee* v. *United States* (113 F. 2d 729); *United States* v. *One Book Called Ulysses* (72 F. 2d 705); *United States* v. *One Unbound Volume of Prints* (128 F. Supp. 280).

New York Soc. for Suppression of Vice, 234 N. Y. 1; 4-5), with reference to "its dominant effect", "not on any particular class, but upon all those whom it is likely to reach" (*United States* v. *Levine*, 83 F. 2d 156, 157; *United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 707-708, affg. 5 F. Supp. 182); and that consideration will be given, among other factors, to "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient". (*United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 708.) The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same danger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications.

The judgment appealed from should be affirmed, with costs.

Desmond, J. Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been here enjoined, are obscene. They thus concede that the books are such as are subject under section 22-a of the New York Code of Criminal Procedure to an injunction at the suit of the corporation counsel who brought this action. Those concessions leave defendants with one possible ground for appeal and that ground they take. Their sole assertion in this court is that section 22-a is unconstitutional because, say defendants, any and every prior restraint on the publication or sale of obscene literature violates the First Amendment. Since no other question is presented, we must limit ourselves to answering that ques- [fol. 90] tion. It detracts nothing from Judge Fuld's fine opinion to point out that its discussion of many other questions not before us on this appeal is not binding on this court.

Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect

obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex Parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146). The standard set up by section 22-a, "obscene, lewd, lascivious, indecent or disgusting", is a valid and adequate one (*Winters* v. *New York*, 333 U. S. 507, 518; see *Rosen* v. *United States*, 161 U. S. 29, 42; *Swearingen* v. *United States*, 161 U. S. 446, 451; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; U. S. Code, tit. 18, § 1461; *United States* v. *Limehouse*, 285 U. S. 424; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, 158, *supra*; *Times Film Corp.* v. *Chicago*, —— F. Supp. ——, decided March 21, 1956; *People* v. *Muller*, 96 N. Y. 408; *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd. by equal vote 335 U.S. 848; *Commonwealth* v. *Holmes*, 17 Mass. 335).

No one claims that section 22-a lacks appropriate procedural protections for those sued under it.

The judgment should be affirmed, with costs.

Dye and Van Voorhis, JJ., concur in opinion of Fuld, J.; Conway, Ch. J., and Froessel, J., concur in opinion of Desmond, J.; Burke, J., taking no part.

Judgment affirmed.

[fol. 91] [Caption omitted]

[fol. 92] IN THE COURT OF APPEALS OF NEW YORK

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York, Respondent,

vs.

KINGSLEY BOOKS, INC., MARTIN KLEINBERG and LOUIS FINKELSTEIN, Doing Business as Times Square Book Shop, Appellants, and

METROPOLITAN BOOK SHOP, INC., & Ors., & c., Defendants

REMITTITUR—April 27, 1956

Be it remembered, that on the 31st day of October in the year of our Lord one thousand nine hundred and fifty-five, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, doing business as Times Square Book Shop the appellants in this cause, came here unto the Court of Appeals, by Emanuel Redfield and Sidney Glasser, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Supreme Court, New York County. And Peter Campbell Brown, Corporation Counsel of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 93] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellants, and by Mr. Seymour B. Quel of counsel for the respondent —, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State

of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(Sgd.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, April 27, 1956.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] In Supreme Court of the State of New York
County of New York

Peter Campbell Brown, etc., Appellee,

against

Kingsley Books, Inc., et al, Appellants

Notice of Appeal—May 7, 1956

I Notice is hereby given that Kingsley Books, Inc. and Martin Kleinberg, and Louis Finkelstein, doing business as Times Square Book Shops hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York dated and entered on April 27, 1956, affirming the judgment of this Court dated July 26, 1955.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

(1) This notice of appeal and proof of service thereof; (2) The remittitur of the Court of Appeals; and (3) The Case on Appeal filed in the Court of Appeals.

III The following question is to be presented by this appeal:

Is Section 22-a Code of Criminal Procedure of New York unconstitutional in that it violates the due process clause

of the Fourteenth Amendment to the Constitution of [fol. 96] the United States which protects the freedom of speech and press, guaranteed by the First Amendment to the Constitution?

Dated: New York, N. Y. May 7, 1956.

Emanuel Redfield, Attorney for Appellants, Office & P. O. Address, 60 Wall Street, New York 5, N. Y.

To: Peter Campbell Brown, Esq., Corporation Counsel of the City of New York, Municipal Building, New York, N. Y.

[fol. 97] Certificate of service (omitted in printing).

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, Doing Business as Times Book Shop, et al., Appellants

vs.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York

Appeal from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—January 14, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with Nos. 61 and 582 and a total of three hours allowed for oral argument.

January 14, 1957.

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MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955.

No. 970 / 101

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

v.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

EMANUEL REDFIELD,
Counsel for Appellants,
60 Wall Street,
New York 5, N. Y.

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Near v. Minnesota, 283 U. S. 697	3, 4, 5, 6
Roth v. Goldman, 172 Fed. (2) 788, 792	5
Winters, 333 U. S. 507	5

STATUTES CITED:

28 U. S. C., Section 1257 (2)	2
Code of Criminal Procedure, Section 22-a	2

OTHER AUTHORITIES:

Lockhart and McClure, The Law of Obscenity and the Constitution, Minnesota Law Review, March, 1954, p. 352	4
Lockhart and McClure, op. cit., p. 320	5
University Chicago Law Review, 222, Note 46	4

Supreme Court of the United States

OCTOBER TERM, 1955.

No.

KINGSLEY BOOKS, Inc., LOUIS FINKELSTEIN, doing business as Times Book Shop, and MARTIN KLEINBERG,
Appellants,
v.
PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,
Appellee.

Statement as to Jurisdiction.

Pursuant to Rule 15, of the Revised Rules, the appellants file this separate statement to support the jurisdiction of the court on this appeal:

(a) Opinion Below.

Copies of the two opinions rendered in the Court of Appeals are appended hereto. The opinion of Special Term, Supreme Court of the State of New York, County of New York, is reported in 208 Misc. 150, and is also found on page 44 of the record.

(b) Statement of Grounds of Jurdisdiction.

(i) The action was brought pursuant to Section 22-a, Code of Criminal Procedure, to enjoin the appellants from selling past and future issues of certain publications on the ground that they are obscene. Surrender

and destruction of the publications would follow the injunction. A copy of the statute is appended hereto as Appendix B.

(ii) The date of the judgment of the Court of Appeals is April 27, 1956, and its entry is the same date (Appendix C). The date of filing of the notice of appeal is May 8, 1956, in the Supreme Court, State of New York, New York County.

(iii) Jurisdiction is conferred by 28 U. S. C., Section 1257 (2).

Question Presented.

The sole question presented is the constitutional validity under the Federal Constitution of Section 22-a, Code of Criminal Procedure of the State of New York. Appellants claim that this statute violates due process in that it is a prior restraint upon publications as protected by the Fourteenth Amendment to the Constitution of the United States which incorporates the guarantees of free speech and press found in the First Amendment to that Constitution.

The appellee as Corporation Counsel of the City of New York instituted this action pursuant to said statute to restrain the appellants from distributing the issues, past and future, of a publication entitled, "Nights of Horror." The complaint further requested that the appellants be directed to surrender all copies of said publication in their possession to the sheriff and that said publications be destroyed. The ground for the action was the assertion made that these publications are obscene. The answer of the appellants raised the issue of the constitutionality of the statute (Record, p. 10). Upon the trial by motion to dismiss the complaint the issue of unconstitutionality was again raised (Record, p. 40, and

renewed, p. 41). The Trial Justice thereupon passed on the question of constitutionality and wrote a lengthy opinion on that issue and held the statute to be constitutional. (Record, p. 44).

Thereafter, an appeal was taken directly to the Court of Appeals from the judgment of Trial Court, pursuant to New York practice, because the sole issue was the unconstitutionality of the statute. The Court of Appeals ruled on that sole issue on the merits and held that the law is constitutional. The Court of Appeals affirmed the judgment of the Trial Court, with three Judges voting to affirm on the basis of one opinion and three Judges for the reasons set forth in another opinion.

Importance of This Case.

In the second sentence of Judge Fuld's opinion, it is said:

> "The importance and perplexities of the constitutional issue presented persuade me that there must be a more full discussion than some of my associates believe necessary of the reasons for, and the reach of the decision made."

This case squarely presents to the Court an issue not previously decided by it, and which was left open by the decision in *Near v. Minnesota*, 283 U. S. 697.

Judge Fuld also stated:

> "The issue whether restraints in advance of production may be applied to obscene matter has, however not yet been squarely decided."

Resolution is necessary for the question, whether there may be a prior restraint of a publication by administrative agent or court on the ground that a publication is obscene.

This case raises the sole question as to the constitutionality of a law which provides a prior restraint against distribution of publications deemed obscene. The question is therefore ripe for decision.

The prior restraint consists in the injunction decree which restrains the distribution of a book already published. This Court previously held that distribution is as well-protected as publication. *Lovell v. Griffin*, 303 U. S. 444. This Court also held that restraint by a court is on the same footing with that of restraint by an administrative official. *Cantwell v. Connecticut*, 310 U. S. 296.

Indeed, the protection from prior restraint is significant only after a book is published and is ready for distribution. Only then does the protection against prior restraint have any meaning. It can hardly be said that there can be a prior restraint of an idea that merely resides in the brain of the author. It is only after the idea has been reduced to publication and is about to circulate that protection becomes meaningful.

So in this case prior restraint is present, because what was done here was to enjoin the circulation of a publication already in being.

The Near case, it is important to remember, involved not only an injunction against publication of future issues of the publication, but also distribution of issues already in being.

While in the *Near* case by way of dictum, language is found that obscene publications are not protected, nevertheless, the dictum has never been applied or clarified. See, Lockhart and McClure, The Law of Obscenity, and the Constitution, Minnesota Law Review, March, 1954, p. 352, under "An Open Question"; also, 22 University Chicago Law Review, 222, Note 46.

The dictum in *Near* contains two obscurities. First, the statement that obscene publications are not constitutionally protected could have meant that the publisher or distributor of the publications might be punished, as was the situation in *Chaplinsky*, 315 U. S. 568, and *Winters*, 333 U. S. 507. This would leave untouched the doctrine against prior restraints. The *Near* dictum, which was followed in *Chaplinsky* and *Winters*, simply holds, therefore, that the publisher and distributor of such publications may be punished (cf. *Doubleday & Co., Inc., v. New York*, 335 U. S. 848, and *Beauharnais v. Illinois*, 343 U. S. 250).

A second obscurity of the dictum is found in the subsequent joinder of the obscene with the *libelous* as not being constitutionally protected (see minority opinion in *Near* as to equating both offenses). Yet in the *Near* case the libel was most offensive. Nevertheless, this Court decided that such publications could not be restrained from being distributed or from being published in the future.

If one is drawn into comparing the social evils to be restrained it could be argued with great force that the libels of a race, and incitements against persons of that race in *Near* presented a much greater social evil than the publications in this case. Yet this Court refused to permit such inflammatory publications to be restrained. Obscenity may have its evils. What it means when applied may be as debatable and as bewildering as it was to Judge Frank in *Roth v. Goldman*, 172 Fed. (2) 788, 792. See also, *Lockhart and McClure*, op. cit., p. 320. This doubt could hardly be applicable to the scurrilous and vicious libel against a race, such as found in *Near*.

The Court of Appeals here stated: "The issue whether restraints in advance of publication may be applied to obscene matter has, however, not yet been squarely decided." Nevertheless, that Court (like the *minority* in

Near) found a distinction between a prior restraint exercised by an administrative board against distribution of a motion picture and the restraint exercised by a Judge. This distinction, it is respectfully submitted, is not tenable. This Court previously held that there was no distinction, beginning with the *Near* case, in which an injunction issued by a Court, through *Cantwell v. Connecticut*, where this Court said:

> *"A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."* (Italics supplied.)

The reason the question presented is substantial for plenary consideration is that this Court should decide whether distribution of a book may be enjoined because it has been found to be obscene by a Judge. Appellants contend that the Constitution forbids all prior restraints, that the injunction against distribution of existing books, like in *Near*, is a prior restraint and that like *Near* a prior restraint is forbidden to Judges as w ll as to administrative officials.

The office of censor cannot be conferred on a Judge instead of on an administrative official. Yet, the statute here does just that.

Because the principle involved herein has not been settled and its application is of a recurrent nature it is submitted that this appeal raises a substantial question that should be reviewed by this Court.

Respectfully submitted,

EMANUEL REDFIELD,
Attorney for Appellants.

APPENDIX A.

Opinion.

State of New York
Court of Appeals

PETER CAMPBELL BROWN, etc.,
Respondent,
vs.
KINGSLEY BOOKS, Inc., *et al.*,
Appellants.

FULD, J.:

Although we are all agreed for affirmance, we reach that conclusion by somewhat different routes. The importance and perplexities of the constitutional issue presented persuade me that there must be a more full discussion than some of my associates believe necessary of the reasons for, and the reach of, the decision being made.

Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), Section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of Section 1141 of the Penal Law, the statute prohibiting the sale and distribution of items obscene, Section 22-a, insofar as here pertinent, embraces "any book, magazine, pamphlet and coming book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character which is obscene, lewd, lascivious, filthy, indecent or

disgusting." It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who "sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute" any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to "surrender" the offending matter to the sheriff who "shall be directed to seize and destroy the same" (subd. 3).

The present suit, instituted by the Corporation Counsel of the City of New York against a number of book sellers with premises in that city, concerns a series of paper-bound booklets collectively entitled "Nights of Horror," which had been found displayed for sale in defendants' stores. Members of the police force, who testified at the trial, had purchased copies of these booklets from the various defendants, at prices ranging from $2 to $4 a copy. The publications themselves were also introduced in evidence. The Trial Judge, in a carefully considered opinion, found that the booklets were plainly obscene and pornographic, "dirt for dirt's sake," and held that the statute did not violate any constitutional guarantee. He thereupon granted judgment (1) permanently enjoining defendants from distributing, selling, or acquiring possession of such publications, (2) requiring them forthwith to surrender to the sheriff for destruction all copies in their possession, and (3) directing the sheriff to seize and destroy such copies, in the event of defendants' failure to surrender them.

The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy. Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the Penal Law, no constitutional argument

could successfully have been leveled against resulting convictions. Indeed, not questioning the definiteness of the statutory standard, not challenging the test of obscenity applied by the Trial Judge, who concluded that the booklets were obscene under any of the judicially-announced criteria and not objecting to the failure to require a jury trial,[1] defendants' sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional "prior restraint," interfering with freedom of speech and press (U. S. Const., First and Fourteenth Amendments; N. Y. Const., Art. I, §8).[2]

There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 501-502; see, also, Chafee, *Free Speech in the United States* [1941], p. 545), that it protects distribution as well as initial publication (see *Lovell v. Griffin*, 303 U. S. 444; *Grosjean v. American Press Co.*, 297 U. S. 233), and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas (see *Winters v. New York*, 333 U. S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 153). While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to

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[1] Even in a criminal prosecution based upon Section 1141 of the Penal Law, involving as it does a misdemeanor charge, the defendant is not entitled to a trial by jury as a matter of constitutional right (N. Y. Const., Art. VI, §18; see *People v. Kaminsky*, 208 N. Y. 389, 394; *People ex rel. Cosgriff v. Craig*, 195 N. Y. 190, 195-196; see, also, N. Y. C. Crim. Cts. Act, §31, subd. 1 [b], [c]).

[2] Nor do we concern ourselves with the further provision of the statute directing the Court to render its decision "within two days of the conclusion of the trial" (subd. 2), in view of the fact that the parties agreed neither to invoke nor insist upon that requirement.

meet an evil which the state has a substantial interest in correcting (see *Joseph Burstyn, Inc., v. Wilson*, *supra*, 343 U. S. 495, 502-504; *Feiner v. New York*, 340 U. S. 315, 319; *Niemotko v. Maryland*, 340 U. S. 268, 271-272; *Winters v. New York*, *supra*, 333 U. S. 507, 509; *Cantwell v. Connecticut*, 310 U. S. 296, 307-308; *Thornhill v. Alabama*, 310 U. S. 88, 97-98, 105).

That clearly-drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court (see *People v. Doubleday & Co., Inc.*, 297 N. Y. 687, affd. by equally divided court, 335 U. S. 848; *People v. Wendling*, 258 N. Y. 451; *People v. Pesky*, 254 N. Y. 373; *People v. Muller*, 96 N. Y. 408), and by the United States Supreme Court (see *United States v. Alpers*, 338 U. S. 680; *Winters v. New York*, *supra*, 333 U. S. 507, 510, 518, 520; *United States v. Kimehouse*, 285 U. S. 424; see, also, *Chaplinsky v. New Hampshire*, 315 U. S. 578, 571-572; *Near v. Minnesota*, 283 U. S. 697, 716; *Beauharnais v. Illinois*, 343 U. S. 250, 266). Imprecise though it be—its "vague subject matter" being largely "left to the gradual development of general notions about what is decent" (*per* Learned Hand, J., *United States v. Kennerly*, 209 Fed. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard. Indeed, in the *Winters* case, *supra*, 333 U. S. 507, the Court not only indicated that the collocation of the very words found in

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[3] It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, e. g., Jahoda and Staff of Research Center for Human Relations, New York University [1954], *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.*) The findings ultimately arrived at will no doubt prove helpful to the legislatures and courts of the future in dealing with the problem.

Section 1141 of our Penal Law, "obscene, lewd, lascivious, filthy, indecent or disgusting," is sufficiently "well understood through long use in the criminal law" to satisfy the due process requirements of definiteness and certainty (333 U. S., at p. 518), but actually pointed to the provision as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications" (333 U. S., at p. 520).[4]

Thus, by virtue of Section 1141, it has long been a misdemeanor in this state, punishable by imprisonment or fine or both, to sell or distribute any written or printed obscene material of the kind described in Section 22-a of the Code. Similar statutes are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chi. L. Rev. 216). The legislature, however, apparently concluded that such penal sanctions were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised (cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, Leg. Doc. [1954], No. 37, pp. 31-32). Whether or no the legislature acted wisely is, of course, no concern of the courts. Our inquiry is limited to whether its act impinges upon free expression.

As already noted, no injunction may issue under Section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the Penal Law. What the statute does it to provide an additional sanction against the dissemination of obscene matter.

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[4] Application of the standard may, perhaps, raise constitutional questions in individual cases (cf. *Doubleday & Co. v. New York*, 335 U. S. 848, affg., by equally divided court, 297 N. Y. 687; *Roth v. Goldman*, 172 F. 2d 788, 792, *per* Frank, C. J., concurring; see Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295), but the present is not such a case.

It is, however, defendants' position that the constitution limits the state to the imposition of punishment, and that distribution of the writing itself may not be prevented. An injunction, such as the present one, even though it is issued after publication and after a judicial trial, is characterized as such suppression and censorship as to stamp it an impermissible "prior restraint." In other words, it is urged, as long as the publisher or vendor of a writing is willing to risk the imposition of criminal penalties, he has an absolute right to proceed with its publication or distribution and any restriction of that right is unwarranted, since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The major, though not exclusive, purpose of the guarantee of free expression, it has been observed, is "to prevent previous restraints upon publication" (*Near v. Minnesota, supra*, 283 U. S. 697, 713; *Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 503). Though difficult of precise formulation (see Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems, 648), this principle of immunity from prior restraint has been applied by the United States Supreme Court in a variety of situations to strike down licensing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion (see, e. g., *Poulos v. New Hampshire*, 345 U. S. 395; *Kunz v. New York*, 340 U. S. 290; *Niemotko v. Maryland, supra*, 340 U. S. 268; *Cantwell v. Connecticut, supra*, 310 U. S. 296; *Schneider v. State*, 308 U. S. 147). As the Court has, however, pointed out, "The protection even as to previous restraint is not absolutely unlimited," although the limitation has been recognized "only in exceptional cases" (*Near v. Minnesota, supra*, 283 U. S. 697, 716; see, also, *Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 504).

The Supreme Court has asserted, by way of dictum, that the control of obscenity presents such an exceptional case. In *Near v. Minnesota, supra*, 283 U. S. 697, 716, Chief Justice Hughes, in discussing certain extraordinary areas exempt from the sweeping prohibition against prior restraint, stated that one of the exceptions was that "the primary requirements of decency may be enforced against obscene publications," and similar reservations have also been expressed elsewhere (see *Chaplinsky v. New Hampshire, supra*, 315 U. S. 568, 571-572; *Lovell v. Griffin, supra*, 303 U. S. 444, 451; see, also, Chafee, *op. cit.*, p. 10). The issue whether restraints in advance of publication may be applied to obscene matter has, however, not yet been squarely decided. In the area of motion picture censorship—involving a true prior restraint by an administrative body—the Supreme Court, while striking down various other criteria on the ground that they did not satisfy the minimum requirements of definiteness and certainty, has thus specifically left open the question "whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films" (*Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 505-506; see *Superior Films v. Dept. of Education*, 346 U. S. 587; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587; *Gelling v. Texas*, 343 U. S. 960; cf. *Holmby Productions, Inc., v. Vaughn*, 350 U. S. 870).[5]

[5] I do not believe that *Holmby Productions* (*supra*, 350 U. S. 870) answers the question thus left open in the *Burstyn* case. The Kansas statute there considered provided for the banning of any motion picture found by the state's board of review to be "obscene, indecent or immoral, or such as tend to debase or corrupt morals." The film, "The Moon is Blue," while labeled by the board as "obscene," as well as "indecent and immoral," was specifically condemned for the following stated reason:

> "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme."

The Supreme Court reversed the judgment of the Kansas high court which had accepted the board's interpretation of the statute as well as its determination (177 Kan. 728). It is our surmise that this decision of the Supreme Court—reflected in a *per curiam*, merely citing *Burstyn* (*supra*, 343 U. S. 495) and *Superior Films* (*supra*, 346 U. S. 587)—

We are not, in my opinion, required in this case to decide categorically the validity, under all circumstances, of any and every prior restraint aimed at obscene matter, regardless of the nature and scope of the regulatory measure employed or of the particular medium of expression involved. While strong objections have been voiced against any practice of general censorship, even in the area of obscenity, and whether administered by an administrative body or a judicial tribunal (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 661, 670-671; cf. *Superior Films v. Dept. of Education*, *supra*, 346 U. S. 587, 588, per Douglas, J., concurring), that broad question is not here presented. Sharp and precise lines cannot always be drawn between permissible and non-permissible regulatory measures in the realm of expression (see *Winters v. New York*, *supra*, 333 U. S. 507, 518; *Joseph Burstyn, Inc., v. Wilson*, *supra*, 343 U. S. 495, 517-518, *per* Frankfurter, J., concurring). As applied to the control of obscenity, a scheme of advance censorship directed against all *possibly* obscene writings would, in my judgment, go too far. The case before us, however, concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees (cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650-651).

There is nothing in the statute before us that constitutes or resembles a system of licensing or other threshhold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or

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turned solely on the wide reach and the essential vagueness of the standard employed by the Kansas court. Since any film could apparently be banned as "obscene, indecent or immoral" if a sex theme predominated, the term "obscene" was no narrower, no more definite or certain, than the criteria previously stricken as too vague in the *Commercial Pictures* and *Superior Films* cases (*supra*, 346 U. S. 587).

behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, Section 22-a makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the Trial Judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that is is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well as the law (Civ. Prac. Act, §584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660).

In point of fact, examination of the operation and effect of Section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if not more so, to deter publication of an obscene work (see Pound, *supra*, 29 Harv. L. Rev. 640, 651; Emerson, *supra*, 20 Law and Contemporary Problems, at p. 660). In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement;

and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt. These words are, of course, limited to the statute before us dealing with obscenity, and nothing here written is to be taken as sanctioning the injunctive process in dealing with other objectionable or anti-social material, such as libel.

The reliance which defendants place upon *Near v. Minnesota* (*supra*, 283 U. S. 697) is untenable. That case involved a Minnesota statute which authorized the issuance of an injunction, in a suit to be brought in the name of the state, against the further publication of any newspaper or periodical adjudged to be "malicious, scandalous and defamatory."[6] Under the statute, any articles deemed to be derogatory to a public officer could be branded "malicious, scandalous and defamatory," if the publisher were unable to establish that they were true *and* "published with good motives and for justifiable ends" (283 U. S., at pp. 709-710). Once such an injunction was issued, resumption of any future printing was banned and punishable as a contempt, unless the publisher was able to satisfy the Court as to the character of the new publication. The Court would thus be constituted a censor to pass on the contents of future issues in advance of publication, and whether the publisher "would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the Court's ruling" (283 U. S., at p. 712). It was this feature of the law, particularly as applied to newspaper comment upon matters of public importance, upon ideas in the realm of political ex-

[6] The same statute also authorized an injunction against the further publication of any newspaper or periodical adjudged to be "obscene, lewd and lascivious," but that portion of the statute was not involved in the case.

pression, that was regarded by the Supreme Court as "of the essence of censorship" and an unwarranted infringement on freedom of discussion (283 U. S., at p. 713).

The features condemned in *Near* are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writings here condemned are unredeemed by even an iota of idea content or of artistic worth. And, unlike the statute in *Near*, which sanctioned a general and future restraint, there is here no restraint of any kind on the publication or distribution of material to be written or produced in the future. The Corporation Counsel in the court below sought to have the statute read as authorizing an injunction against the sale and distribution, not only of any published work found to be obscene, but also of any future work in the same series as well. This, the Trial Court very properly refused to do, and it is my judgment that the statute does not permit of the suggested contrary construction.

In short, careful analysis of the operation and effect of Section 22-a, in relation to the basic aims and objectives of the constitutional guarantees, persuades me that the limited injunctive remedy here provided may not be condemned as a forbidden prior restraint. As a matter of fact, analogous decisions under the Federal Tariff Act of 1930 (Act June 17, 1930, ch. 497, tit. III, §305; 19 U. S. C., §1305) are at hand as authority that such measures do not involve any aspect of prior restraint at all, since the statutory penalties are inflicted only after the challenged work has already been published. The Tariff Act thus provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of

such matter upon adjudication after trial that it is obscene. Although the constitutionality of these provisions has apparently never been passed upon by the Supreme Court, the lower Federal Courts have uniformly either held (see *Besig v. United States*, 208 F. 2d 142; *United States v. One Obscene Book Entitled "Married Love,"* 48 F. 2d 821, 822) as assumed (see *Parmelee v. United States*, 113 F. 2d 729; *United States v. One Book Called Ulysses*, 72 F. 2d 705; *United States v. One Unbound Volume, etc.*, 128 F. Supp. 280) the statute to be constitutional. Thus, in *United States v. One Obscene Book Entitled "Married Love," supra*, 48 F. 2d 821, Judge Woolsey rejected the contention that the statute impinged on the right of freedom of the press, noting that it did "not involve the suppression of a book before it is published"; in the course of his opinion, he wrote (p. 822):

> "After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press."

It is further urged that even publications adjudged to be obscene cannot constitutionally be withheld from free circulation in the market place of ideas; that, apart from the rights of the publisher and vendor, the public itself has the right to read and examine whatever is published and to form its own opinion of a publication's value and propriety. But here, as in other situations, the question is one of balancing the several competing interests involved. Where the publication is one plainly obscene, serving no purpose but to satisfy a market for filth and

smut, there could be no harm to the public in completely removing it from circulation following a judicial adjudication of obscenity. The Supreme Court has emphasized, in reference to the federal statute declaring obscene material non-mailable (35 Stat. 1129; 18 U. S. C., §334), that there is no necessity "to satisfy all tastes, no matter how perverted." (*Hannegan v. Esquire, Inc., supra*, 327 U. S. 146, 158.)

In reaching the conclusion which I do, I must, of course, assume that the statutory proscription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it "broadly as a whole" (*Halsey v. N. Y. Society*, 234 N. Y. 1, 4-5), with reference to "its dominant effect," "not on any particular class, but on all those whom it is likely to reach" (*United States v. Levine*, 83 F. 2d 156, 157; *United States v. One Book Called Ulysses, supra*, 72 F. 2d 705, 707-708, affg. 5 Fed. Supp. 182); and that consideration will be given, among other factors, to "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient" (*United States v. One Book Called Ulysses, supra*, 72 F. 2d 705, 708). The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the Trial Court's findings of fact. The same danger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectively enforcing its policy against the circulation of the obscene, but in making certain that the Courts apply standards that will insure the least possible risk of interference with unobjectionable publications.

The judgment appealed from should be affirmed, with costs.

DESMOND, J.:

Defendants expressly admit the obvious fact that the books which they sold, and the further sale of which has been here enjoined, are obscene. They thus concede that the books are such as are subject under Section 22-a of the New York Code of Criminal Procedure to an injunction at the suit of the Corporation Counsel, who brought this action. Those concessions leave defendants with one possible ground for appeal, and that ground they take. Their sole assertion in this court is that Section 22-a is unconstitutional because, say defendants, any and every prior restraint on the publication or sale of obscene literature violates the First Amendment. Since no other question is presented, we must limit ourselves to answering that question. It detracts nothing from Judge Fuld's fine opinion to point out that its discussion of many other questions not before us on this appeal is not binding on this Court.

Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 572; *Near v. Minnesota*, 283 U. S. 697, 716; *Burstyn v. Wilson*, 343 U. S. 495, 502-504; see *Beauharnais v. Illinois*, 343 U. S. 250, 266; *Ex parte Jackson*, 96 U. S. 727, and *Hannegan v. Esquire*, 327 U. S. 146). The standard set up by Section 22-a, "obscene, lewd, lascivious, indecent or disgusting," is a valid and adequate one (*Winters v. New York*, 333 U. S. 507, 518; see *Rosen v. United States*, 161 U. S. 29, 42; *Swearingen v. United States*, 161 U. S. 446, 451; *Robertson v. Baldwin*, 165 U. S. 275, 281, 18 U. S. C. 1461; *United States v. Limehouse*, 285 U. S. 424; *Hannegan v. Esquire*, 327 U. S. 146, 156, 158, *supra*; *Times Film Corp. v. Chicago*, ___ F. Supp. ___, decided

March 21, 1956; *People v. Muller*, 96 N. Y. 408; *People v. Doubleday*, 297 N. Y. 687, affd. by equal vote 335 U. S. 848; *Comm. v. Holmes*, 17 Mass. 335).

No one claims that Section 22-a lacks appropriate procedural protections for those sued under it.

The judgment should be affirmed, with costs.

Dye and Van Voorhis, JJ., concur in opinion of Fuld, J.; Conway, Ch. J., and Froessel, J., concur in opinion of Desmond, J.; Burke, J., taking no part.

Judgment affirmed, with costs.

APPENDIX B.

Statute Involved.

Section 22-a of the Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§22-a. OBSCENE PRINTS AND ARTICLES; JURISDICTION.

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the Supreme Court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or

image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

APPENDIX C.

Judgment Appealed From.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of April in the year of our Lord one thousand nine hundred and fifty-six, before the Judges of said Court.

Witness,

The Hon. Albert Conway, Chief Judge Presiding.
Raymond J. Cannon, Clerk.

Remittitur April 27, 1956.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Respondent,

vs.

KINGSLEY BOOKS, Inc., MARTIN KLEINBERG and LOUIS FINKELSTEIN, doing business as Times Square Book Shop,

Appellants,

and

METROPOLITAN BOOK SHOP, Inc., & Ors., &c.,

Defendants.

BE IT REMEMBERED, That on the 31st day of October in the year of our Lord one thousand nine hundred and fifty-five, Kingsley Books, Inc., Martin Kleinberg and

Louis Finkelstein, doing business as Times Square Book Shop the appellants in this cause, came here unto the Court of Appeals, by Emanuel Redfield and Sidney Glasser, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Supreme Court, New York County. And Peter Campbell Brown, Corporation Counsel of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellant, and by Mr. Seymour B. Quel of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

sgd/ RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

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Supreme Court of the United States

October Term, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

—v.—

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

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60 Wall Street,
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Supreme Court of the United States

October Term, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

—v.—

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

Opinions Below

The Trial Court wrote an opinion which is reported in 208 Misc. 150. The Court of Appeals wrote an opinion which is reported in 1 N. Y. (2d) 177.

Matters Related to Jurisdiction

(a) Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C., Section 1257(2).

(b) Timeliness

The date of the judgment of the Court of Appeals is April 27, 1956, and its entry is the same date. The date of filing of the notice of appeal in the Office of the Clerk of the Supreme Court, New York County, State of New York is May 8, 1956.

(c) Probable jurisdiction was noted January 14, 1957.

Statute Involved

Section 22-a of the Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

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The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecedent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the

penal law, may maintain an action for ~~an~~ injunction against such person, firm or corporation in the Supreme Court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to

sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

Question Presented

The sole question presented is the constitutional validity under the Federal Constitution of Section 22-a, Code of Criminal Procedure of the State of New York. Appellants claim that this statute violates due process in that it is a prior restraint upon publications as protected by the Fourteenth Amendment to the Constitution of the United States which incorporates the guarantees of free speech and press found in the First Amendment to that Constitution.

Statement of the Case

The appellee's predecessor,* as Corporation Counsel of the City of New York instituted this action pursuant to said statute to restrain the appellants and others from distributing the issues, present and future, of a publication entitled, "Nights of Horror." The complaint (R. 8) alleged the authority of the then plaintiff to institute the suit under the statute. It also alleged that the appellants and others have in their possession certain issues of the publication in question "as a person who sells, or is about to sell, or has in his possession, or distributes, or is about

* The predecessor is Adrian P. Burke. After he resigned to become a judge of the New York Court of Appeals, the appellee was substituted in his stead (R. 73n).

to distribute a publication entitled "Nights of Horror". The complaint further requested judgment that the appellants be directed to surrender all copies of said publication in their possession to the sheriff and that said publications be destroyed. The ground for the action was the allegation that these publications are obscene.

The plaintiff, by order to show cause, dated September 10, 1954 (the same date the complaint was verified), containing a stay moved for a temporary injunction to restrain appellants from distributing the aforesaid publication. The papers were served on September 10, 1954 and returnable September 14, 1954. The application was granted and an order was signed on September 22, 1954 restraining the appellants from acquiring for selling and from distributing any of the publications during the pendency of the action (R. 39).

The answer of the appellants raised the issue of the constitutionality of the statute (R. 10).

The answer which was subsequently amended at the trial, admitted that appellants had in their possession for sale or distribution the aforesaid issues of the publication.

Upon the trial by motion to dismiss the complaint the issue of unconstitutionality was again raised (Record, p. 40, and renewed, R. 41). The trial justice thereupon considered the question of constitutionality that was raised, and made his decision in a lengthy opinion on that issue in which he upheld the constitutionality of the statute (R. 44).

Thereupon, he rendered a judgment, permanently enjoining the appellants and others from "distributing, sell-

ing or acquiring possession of Volumes I and II and Issues 3 to 14, inclusive of the volumes of the publication entitled "Nights of Horror". He further directed that the said publications be surrendered by the appellants to the Sheriff of the City of New York to be destroyed by him.

Thereafter, an appeal was taken directly to the Court of Appeals from the judgment of trial court, pursuant to New York practice, because the sole issue was the unconstitutionality of the statute (Section 588, Sub. 4, C. P. A.). The Court of Appeals ruled on that sole issue on the merits, and held that the law is constitutional. In affirming the judgment, the Court of Appeals was unanimous (Judge Burke, not sitting)—three judges voting to affirm on the basis of one opinion and three judges for the reasons set forth in another opinion.

Summary of Argument

1. All publication are entitled to protection from previous restraint.

2. Distribution of a publication is protected equally with publishing.

3. Censorship by a court, even after trial, with procedural safeguards, violates the Constitution of the United States.

4. The injunctive procedure of the statute operates to deny to the public the right to read it, even before it is ever circulated.

5. In cases of alleged "obscenity" the constitutional protection against prior restraints applies as it does to any other case of infringement of expression.

6. "Obscenity" is no worse than libel. Yet libel is protected from prior restraint.

7. Before a publication can be denied constitutional protection it must at least be shown that the words will probably and imminently produce anti-social behavior. No such evidence is available.

What Is at Stake in This Case

The words of Judge Pound in *People* v. *Gitlow*, 234 N. Y. 132, 158, that "the rights of the best of men are secure only as the rights of the vilest and most abhorent are protected" applies here to publications that may be deemed of no social value. Indeed, in the recent case of *Winters* v. *New York*, 333 U. S. 507, it was held that even publications of no social value are entitled to protection.

In its broader aspects, this appeal presents a question of first magnitude in the field of the dissemination of ideas. What will be decided and said by the Court here will affect the problem of censorship with relation to claims of obscenity not only with relation to prior restraints through court injunctions, but also through administrative officials, such as motion picture licensors.

If the principle of prior restraint by injunction is sustained here, then it could be extended and applied equally to newspapers, motion pictures, plays, paintings, phonograph records and even public addresses. In other words, the principle could be expanded to the point where a court of equity would become a licensor, censor and official book burner. (The former function is exercised by temporary injunction against issuance of the book and latter func-

tion is fulfilled by a direction to the sheriff to seize and destroy.) A more ignoble role for a court cannot be found in the history of our jurisprudence. See *Brandreth v. Lance*, 8 Paige 24.

> "Not only is the general law of obscenity absurd as applied to literature, and not only is the task of judging literature beyond the average judge's capacity and ability, but as a matter of physical organization courts are not able to do justice to literature, in the main, even had they such capacity and ability". Alpert, "Judicial Censorship of Obscene Literature," 52 Harv. Law. Rev. 40, 71.

To say, as Special Term does (R. 58) that the instant publications are of no social value and serve no useful purpose is to fall into the error of censorship. It puts the cart before the horse, through circuity of reasoning. It assumes the role of the censor and at the same time disavows the censor's role. The censor assumes the role of the censor and pronounces judgment on the worth of a book, steadfastly announcing that he is not censoring, although in passing judgment, he is actually censoring. This has been the practical fault of all censorship, and history has shown how wrong the censors are. See, Haight, "Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places" (2 ed. 1955) cited by Special Term (R. 55), where among other things, is found Plato's suggestion that Homer be expurgated for immature readers.

To say, as Special Term does, that the books in this case will not be listed in "Banned Books" is to beg the whole question. The difficulty, with the role of censorship

is this lack of competence to foresee the future. Undoubtedly, the censors of the books on that list thought they were competent to adjudge and condemn the publications. Yet, as Special Term observes (R. 56) those books became classics.

While appellants do not contend that the books in this case will be classics, the test (whoever can set up such a test) however is not whether books will become classics. The test is, is there a prior restraint by someone who prevents the publication from circulating.

By this statute, the office of censor is conferred on the judiciary. To substitute a judge for an administrative officer to perform the job of censorship does not endow the statute with constitutional validity. This was well-settled in *Cantwell* v. *Connecticut*, 310 U. S. 296, where it was held that it did not make any difference whether the prior restraint was by an administrative officer or by a Court. The fact that a court can sit in judgment on the conduct of an administrative officer does not save the statute, containing a prior restraint. Said the Court, "Moreover the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint, which in the field of free speech and press, we have held inadmissible."

Special Term sought to distinguish that case (R. 64), by stating that the instant case did not involve the requirement of a license. But that is not the principle involved. The principle cuts much deeper. The principle is that a prior restraint is inadmissible to anyone, because history has shown that censors are not to be trusted with the determination as to which publications may be dis-

seminated. Indeed, in the *Cantwell* case the Court followed the words just quoted with the following additional observation: "A statute authorizing previous restraint upon the exercise of the guaranteed freedom by *judicial decision after trial* is as obnoxious to the Constitution as one providing for like restraint by administrative action." (Emphasis supplied.)

Another well-settled principle is that a restraint upon distribution is as offensive as a restraint on publication. One cannot operate without the other. Publications are generally created for dissemination. To bar dissemination is to effectually restrain publication. In *Lovell v. Griffin*, 303 U. S. 444 it was held: "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom of liberty as liberty of publishing; indeed without circulation, the publication would be of little value.' Ex Parte Jackson, 96 U. S. 727, 733."

What the Court of Appeals Decided

Two of the Judges concurred in an opinion by Judge Desmond in holding that previous decisions by this Court foreclosed any doubt about the validity of the statute.

Two other Judges concurred in an opinion by Judge Fuld which stated that no prior restraint is involved here, because decision to restrain is arrived at by a court after a hearing. It distinguished such situation from that of an administrative censor of a motion picture before it is distributed.

In arriving at this conclusion, the opinion overlooked the decision and words of the *Near* case, and also over-

looked the fact that the dissenting Justices in *Near* said the same thing, but did not prevail.

In principle there is no difference between an administrative official who prevents distribution of, let us say, a motion picture and a judge who issues a temporary and then a permanent injunction against a publisher or distributor who is about to broadcast the book. In both cases, the subject is prevented from circulating.

The present case is identical with *Near* from the issuance of a temporary injunction to final injunction. The only difference is that *Near* dealt with a libel and this deals with the subject of obscenity.

It should also be observed at this point that the opinion (R. 87) unfortunately falls into a mistake of stating that *Near* was directed only against *future* publication of issues containing defamatory matter. The fact is that the judgment was directed also against *present* issues. Both were held inadmissible by this Court (p. 704, bottom, 706).

Another regrettable emphasis in the Court of Appeals (R. 88) is that the *Near* case dealt with political figures and public officials. It will be found, however, that the defamatory articles were directed also against private persons, newspapers and the "Jewish race". Since *Near*, this Court made clear in *Winters* v. *New York*, 333 U. S. 507, that it is not informative publications alone that are entitled to constitutional protection.

We now proceed to examine and apply the applicable constitutional principles:

POINT I

Prior restraints on publications and distribution are prohibited by the Federal Constitution.

In discussing this Point the subject is treated without any special reference to the element of "obscenity". Particular application of the rule to "obscenity" will be treated subsequently in Point III.

Justice Holmes pointed out that the First Amendment was adopted for the very purpose of preventing previous restraints in the light of the abuses of the past such as seditious utterances and licentiousness. *Leach* v. *Carlisle*, 258 U. S. 138, 141. See also, *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 452; *Superior Films* v. *Department of Education*, 346 U. S. 587, per Justice Douglas, concurring; *United States* v. *Paramount Pictures*, 334 U. S. 131, 166; Judge Frank in *Roth* v. *United States*, No. 582, argued jointly with this case.

Previous restraints means restraints on the dissemination of ideas. It means suppression of a publication or an idea. These may be accomplished by seizing and destroying publications or by enjoining their circulation to the public. In both cases, dissemination is throttled. (Both methods are involved here.) A person may be willing to risk punishment for his book, but at the same time he may keep his book alive. The history of the past and present shows that there are individuals of that mind.

It should be noted that New York has a penal statute which covers the violations provided by the law under attack. See, Section 1141, Penal Law of New York.

Blackstone said (4 Blackstone 151-152), "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no prior restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.".

In other words, Blackstone states that there cannot be a restraint in advance, but that punishment or liability may be incurred.

The criticism of Blackstone has been made, not that this statement is unsound, but rather that it does not go far enough to protect innocent publications from subsequent punishment or liability. (See, 2 Cooley, Constitutional Limitations, (8 ed.) p. 885.)

Near v. *Minnesota*

The present case is governed by *Near* v. *Minnesota*, 283 U. S. 697. Since this case is the key to the solution of the present case and has been the leading case on prior restraints, it is essential that it be given full exposition. In the *Near* case an injunction statute was patterned along lines similar to the statute under attack here. There an injunction action was brought under the Minnesota law which permitted a county attorney to bring an action for an injunction against any person for publishing: (a) an obscene magazine or periodical, or (b) a scandalous and defamatory newspaper. Participation in such business was deemed the commission of a nuisance. The action

was brought on November 22, 1929, and an order to show cause was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants "to publish, circulate or have in their possession any editions of the periodical *from September 24, 1927 to November 19, 1927*, inclusive, and from publishing, circulating, or having in their possession, any future editions of said The Saturday Press and any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise" (as p. 704, bottom, emphasis supplied).

The reason the emphasis was supplied in the previous paragraph is that attention should be directed to the fact that the action to enjoin circulation as well as publishing was directed against editions that were published prior to the commencement of the action in November, 1927. This emphasis is not unwarranted, because it has been observed that this aspect of the *Near* case has either been ignored or overlooked.

The editions of the publication in question were devoted to libelling public officers, newspapers, many private persons and the "Jewish race".

The trial court found that the newspaper did regularly publish and circulate a defamatory newspaper and thereby constituted a public nuisance. Judgment was thereupon entered adjudging the newspaper a public nuisance to be abated. The judgment enjoined the defendants from producing or circulating or having in their possession any publication *whatsoever* which is a defamatory newspaper and from further conducting said nuisance under the name "The Saturday Press" or any other name (p. 706).

This Court held: the statute is to be tested by its operation and effect (p. 708). It followed, therefore, that the statute was aimed at the distribution and publication of scandalous and defamatory matter as being detrimental to public morals and general welfare. *The object of the statute was not punishment, but suppression.* The reason for its enactment is that prosecutions to enforce in penal laws for libel were not considered effective suppression of the evils of scandal and defamation. (A similar history exists here.)

The defendant had conceded that the newspapers were defamatory. He contended, however, that he can publish them and be punished later. The court held that even though the publication in question might subject the publishers and distributors to subsequent punishment under libel or other laws, nevertheless, they were protected against prior restraint (715, 718).

The Dissent

The dissent was substantially as follows:

1. This is not a case of a prior restraint, because no administrative official is censoring a publication in advance of its publication. It is a court that is rendering judgment on the publication by way of injunctive relief.

> "It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes" (p. 736).

2. The libels alleged were of social evil on a par with that of obscenity (p. 737).

Some earlier cases that bear on the subject are:

In the early and leading New York case of *Brandreth v. Lance*, 8 Paige 24 (1839) the complainant had manufactured pills that were well-known. A former employee threatened to publish a false and libelous life story about the manufacturer. The manufacturer brought suit to enjoin the publication on the ground that he needed protection of his personality (as distinct from his business interest). The publication was to be a threatened invasion of his privacy by defamation. The injunction action was nevertheless dismissed on two grounds: first, that equity would not protect rights in personality by an injunction, and secondly, that such exercise of judicial power would interfere with constitutional protection against previous restraints of speech.

The Chancellor in that case said, "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of a like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the Legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government.

"This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The Court of Star Chamber in England once exercised the power of cutting off

the ears, branding the foreheads, and slitting the noses of the libelers of important personages. Hudson's Star Chamber, 2 Collect. Jurid. 224, and, as an incident to such jurisdiction, that court was undoubtedly in the habit of restraining the publications of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude the notorious Scroggs, Chief Justice of the Court of King's Bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libelous.

"They accordingly made an order of the court prohibiting any person from printing or publishing a periodical entitled 'The Weekly Packet of Advice from Rome, or the History of Popery.' The House of Commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment 8 Harv. St. Tr. 198. And I believe no judge or chancellor from that time to the present has attempted to follow that precedent."

Ex Parte Tucker, 110 Texas 335, 220 S. W. 75 (1920) held unconstitutional an injunction against slander. "It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more

violative or destructive of freedom, than a system of only licensed speech or licensed printing * * * Hallam characterized the liberty of the press as finally gained in England, as but exemption from a licenser * * * "

"But there is no power in courts to make one person speak only well of another. The Constitution leaves him free to speak well or ill; and if he wrongs another by abusing this privilege, he is responsible in damages or punishable by criminal law."

In *Howell* v. *Bee Pub. Co.*, 158 N. W. 358 court held it could not enjoin the publication even of a falsehood, without infringing upon the protection of the freedom of the press.

Some Leading Cases Subsequent to *Near* v. *Minnesota*

Since the *Near* case was decided, other cases illustrate the principle that a previous restraint means any technique provided for use by a public official whereby the official may prevent publication or distribution. The statute works a restraint because a judicial officer is enabled to interfere by injunction with the dissemination of writings he deems to violate the terms of the statute. The statute thereby infringes on all that was decided by recent decisions of the Supreme Court of the United States. These cases bear out this contention:

In *Lovell* v. *Griffin*, 303 U. S. 444 (1937) the defendant was convicted of violating an ordinance in that she did not apply for or obtain a permit before she distributed a pamphlet and magazine, which consisted of religious matter. The ordinance required that a written permit be ob-

tained from the City Manager by all persons who distributed literature of any kind, whether delivered free or whether sold.

The Supreme Court held this requirement unconstitutional as an interference with the press. The constitutional guarantee, it was held, covers distribution as well as publication. The Court said:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.
>
> We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See Patterson

> v. Colorado, 205 U. S. 454, 462; Near v. Minnesota, 283 U. S. 697, 713-716; Grosjean v. American Press Co., 297 U. S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.
>
> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. Near v. Minnesota, supra; Grosjean v. American Press Co., supra; De Jonge v. Oregon, supra.
>
> The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte Jackson, 96 U. S. 727, 733. The license tax in Grosjean v. American Press Co., supra, was held invalid because of its direct tendency to restrict circulation."

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) a statute provided that no person shall solicit money, services, subscriptions or any other valuable thing for any alleged religious, charitable or philanthropic cause unless the cause was approved by the secretary of the public welfare council. It was provided that the secretary shall determine whether the cause is a religious one or a bona fide object of charity. If he approved he issued a certificate.

The defendants were convicted for violating the statute. Then defendants went from house to house. They asked the householder who answered if they could play a phonograph record. If consent was given the defendants played, and offered to sell a book on a religious subject. If the person refused to buy, the defendants would ask for a contribution and when receiving same would give away a religious pamphlet.

The State Supreme Court had construed the activities of defendants to be that of soliciting contributions for a religious cause.

The statute in question as construed and applied was held unconstitutional, in that it deprived the defendants of their right to religious liberty. There is a prior restraint on the exercise of religion in requiring a certificate as a condition precedent to soliciting. The vice furthermore was that the regulation was not of time and place of solicitation. It placed in the hands of the secretary the power to determine what was a religious cause that he would approve. His refusal was based on his appraisal of the facts, the exercise of his judgment and the formation of an opinion. It was not enough that an aggrieved party could appeal to the courts. The Court said:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the States; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts,

the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that 'it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not been performed.' It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. *A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after*

trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." (Emphasis supplied.)

In *Schneider* v. *State*, 308 U. S. 147, the statute of the Town of Irvington forbade the distribution of literature without a license which could be refused by the Chief of Police upon his finding that the canvasser is not of good character or the project is not free from fraud. The applicant was required to be photographed and fingerprinted. The Supreme Court struck down the statute on the ground that the requirement of a permit was a prior restraint upon free speech. It permitted the police officer to determine what literature may be distributed and who may distribute. This is censorship.

In *Kovacs* v. *Cooper*, 336 U. S. 77, 82, it was said: "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement."

See also *Saia* v. *New York*, 334 U. S. 558, holding void an ordinance which required a permit as a condition to using a loud-speaker in public.

Also, *Kunz* v. *New York*, 340 U. S. 290, which voided the New York City ordinance requiring a license for a preacher of religion. It was voided among other things, on the ground that no standards existed to guide the discretion of the licensor and thus placed the power of censorship in his hands.

In *Largent* v. *Texas*, 318 U. S. 418, the ordinance required that a license be obtained to sell books, wares or merchandise. The issuance of the permit was left to the

mayor. He could issue it upon his investigation, and if he deemed it proper or advisable.

The defendant was charged and convicted of violating the ordinance in that he offered books for sale without obtaining a license. The defendant was a member of Jehovah's Witnesses and sold the various boks for a "contribution" of 25¢. If the "contribution" was not made, the book was given without charge. The Court held it was unnecessary to decide whether the distributions were sales or contributions. It was enough that the mayor was empowered to issue the permit only if after investigation he deemed it proper or advisable. This made distribution dependent upon the official and is thus censorship forbidden by the Federal Constitution.

In *Thornhill* v. *Alabama*, 310 U. S. 88 it was said (p. 97): "* * * Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public

concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713."

Murdock v. *Pennsylvania*, 319 U. S. 105 at 116 emphasized clearly that the right to distribute literature cannot be restrained *even if the literature is abusive, provocative or distasteful.*

See also, *Hague* v. *C. I. O.*, 307 U. S. 496; *Thomas* v. *Collins*, 323 U. S. 516; *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Department of Education*, 346 U. S. 587; *Gelling* v. *Texas*, 343 U. S. 960; *Holmby Productions* v. *Vaughn*, 350 U. S. 870.

See also comprehensive opinion of Justice Frankfurter in *Niemotko* v. *Maryland*, 340 U. S. 268, 276.

Distribution Is as Protected as Publication

In *Lovell* v. *Griffin*, 303 U. S. 444, this Court made clear that circulation was protected equally with publishing. "Indeed without circulation, the publication would be of little value", citing from *Ex Parte Jackson*, 96 U. S. 727, 733.

Gompers Case Is Distinguishable

The *Gompers* case that is cited in the *Near* case (*Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418) was grounded on force—not free speech, and therefore, an injunction could issue.

In *Gompers*, the petitioner was held in contempt in that he violated the terms of injunction order which enjoined him from continuing a boycott or from publishing any statement that there was a boycott against a certain firm.

The American Federation of Labor (A. F. L.) of which the petitioner was president had a controversy with respondent over hours of labor. It led to a boycott being declared by A. F. L. Whereupon respondent was declared "Unfair" and was so published in the publication of A. F. L. called "American Federationist" which has a wide circulation among the public and in the A. F. L.

Thereafter the respondent brought action for an injunction against petitioner alleging that petitioner and others had entered into a conspiracy to restrain respondent's business by the boycott and the publication of the "unfair list."

Temporary and permanent injunctions were granted restraining the petitioner and others from the boycott and the publishing of respondent's name on the "unfair" list or "We don't patronize" list published by petitioners.

Defendants appealed from that judgment. But before a decision was had contempt proceedings were instituted for a violation of the judgment. The entire record and proceedings of the original suit were made a part of those proceedings.

The contempt proceeding charged that the petitioner continued the boycott and the publications. The petitioner and others were adjudged in contempt and imprisoned.

Among the contentions made by petitioner in resisting the contempt was that if the publication be deemed to have violated the injunction then the judgment was a violation of freedom of the press.

The Supreme Court held that this attack raises no question as to abridgement of freedom of speech but only involves power of equity to enjoin defendants from continuing a boycott which by words, signals, printed or spoken caused or threatened irreparable damage

There was a conspiracy here.

"The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained."

"In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize', or similar expressions, a force not inherent in the words themselves, *and therefore exceeding any possible right of speech which a simple individual might have.* Under such circumstances they become what have been called 'verbal acts', and as such subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction." (Emphasis supplied.)

The situation here should not be confused with cases involving strikes and labor disputes (see opinion f. 195).

Labor disputes do not merely touch upon free speech and press. They go further—they involve property rights (as distinct from personality) and concerted duress. This is illustrated by *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, where an injunction was granted against picketing. See also *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769; *Cafeteria Employee's Union* v. *Angelos*, 320 U. S. 293. They all illustrate the distinction,—that picketing is more than just speech.

See also in this connection: *Thornhill* v. *Alabama*, 310 U. S. 102; *A. F. L.* v. *Swing*, 312 U. S. 321; *Milk Wagon Driver's Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287.

POINT II

The injunctive relief and the seizure and destruction of the publications operate as a prior restraint.

It was said in the *Near* case that the statute must be judged by its "operation and effect" (p. 708).

The operation and effect of the statute here serves to create a prior restraint on publications. The statute empowers a public official to:

(a) Obtain a stay in an order to show cause to prevent a publisher or distributor from publishing or circulating a book until the hearing on a temporary injunction. (Section 882 Civil Practice Act, New York reads: "Where an application for an injunction is made upon notice, either before or after answer, the court or judge may enjoin the

defendant until the hearing and decision of the application.")

(b) A temporary injunction may issue pending the action. (Section 877, Civil Practice Act of New York provides: "Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it.")

(c) The judgment of the court may restrain the person who possesses with intent to distribute or is about to acquire with the intent to distribute any publication which is obscene. The injunction is to prevent the distribution or acquisition for the purpose of distribution of such publications (Sect. 22-a, sub. 1 Code of Criminal Procedure).

(d) Such judgment of injunction *shall* contain a provision directing such enjoined person to surrender such publications to the sheriff of the county in which the action is brought for the purpose of destroying them (Sect. 22-a, sub. 3, Code of Criminal Procedure).

The Effect of the Statute

The effect of the operation of the statute is one of suppression before the publication can reach distribution to the public. The effect is produced as follows: Suppose a person wishes to acquire a book for the purpose of distribution or already has acquired it for that purpose. Suppose further, that the book had never before reached the

public or even a book reviewer. The corporation counsel, under this law can commence an action for an injunction, get a stay upon an application for a temporary injunction and then upon a final judgment by an equity judge, have the books seized and destroyed.

All these procedures took place in this case (R. 39, 13, 14).

The Public Is Thus Deprived of Reading

The effect of it would be that this book would never circulate and the public would be deprived of its right to read the book and assess its value. (Cf. *Butler* v. *Michigan*, No. 16 October Term 1956, decided February 25, 1957, where it was said, "It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.")

The supposed book might have been Southey's "Wat Tyler" or Byron's "Cain" or Byron's "Don Juan" or Shelley's "Queen Mab", which were condemned respectively in *Southey* v. *Sherwood*, 2 Mer. 435; *Murray* v. *Benbow*, Jac. 474 n; *Lord Byron* v. *Dugdale*, 1. L. J. Ch. 239, Moxon's Case, 2 Townsend's Mod. St. Tr. 356. These were the incidents that brought forth these words from Judge Augustus N. Hand in *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705:

"The foolish judgments of Lord Eldon about one hundred years ago, proscribing the work of Byron and

Southey, and the findings by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

This language was subsequently approved in *Parmelee* v. *United States*, 113 F. (2d) 729, 737, 738; *Hannegan* v. *Esquire*, 327 U. S. 146, 157, 158.

Were the book of this calibre, then its suppression and destruction would have prevented it from proving its value in the market place where all books contend with difficulty for recognition.

Thus, the statute under attack is fraught with a great danger. The peril is at least equal to that of preventing distribution of a book without a license.

The effect runs both against the publisher who has a publication ready for sale for the first time and against the distributor who has the book ready to be circulated for the first time.

In this respect, the restraint is worse than in *Near* because there the statute was directed against a person who makes it a business of regularly defaming people. The implication there is that the publication had to be revealed to the public in order that it could be found to be defamatory as a regular business.

Restraints Against Distribution of Existing Publications Are as Inadmissible as Those Against Further Publication

In the *Near* case the restraint was against existing issues of the newspaper that had been adjudicated defamatory as well as against future publications that may prove defamatory. Despite this Court's decision that injunction would not lie against either, nevertheless, it has been observed that a misunderstanding has arisen that this Court held that only future publication was protected.

Although this is a mistaken reading of the decision it should be noticed that there is no difference in the case of a book, as distinct from a newspaper, between restraint of distributing books in being from restraint in distributing future issues of the same book. A book has more than a one-day value. If one possesses a book for distribution, he expects to distribute that book and not future issues of it. The book in being has value to the person who wishes to circulate it.

Difference Between Prior Restraint and Subsequent Punishment

The *Near* case, which has been consistently adhered to by this Court since its decision is a complete answer that a distinction exists between prior restraint and subsequent punishment. The difference is both historical and psychological.

A commentator on the doctrine of prior restraint of offensive publications saw no difference between injunctions in advance and punishment later. In both cases, he

believed, the effect is to deter or discourage offensive publications. (Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harvard Law Rev. 640.)

The *Near* case effectively rejected Pound's position and distinctly represents an affirmation of the historical and psychological distinction between prior restraint and punishment subsequent to publication or distribution.

But the difficulty with Pound's observation is that it is too mechanical. It fails to account for the numerous persons and even martyrs through history who were willing to take the consequences of their writings so long as their publications circulated. Those stalwarts were not deterred by threatened punishment.

It also fails to allow for the constitutional right of the public to read. The statute here, by injunction and destruction can prevent a publication from reaching the public. Whereas, in the case of the person who is willing to risk punishment for his writings, the public is able to read and evaluate even though the publisher goes to jail.

In this connection, it should be noticed that *Near* admitted that although he stood ready to be punished for what he did, no law could restrain him from publishing (at p. 730).

Subsequent punishment protects a person more readily, because in criminal prosecutions the guilt of the alleged offender must be proved beyond a reasonable doubt; whereas in equity, it is the satisfaction of the chancellor's notions of obscenity that decides whether an injunction should be granted. In a criminal prosecution, a jury may be had (N. Y. City Criminal Courts Act, Sect. 31, Sub. 1

[b] [c]; *People* v. *Price*, 53 N. Y. S. (2) 47). In an equity case such as this, the use of a jury is discretionary with the judge, who is at liberty to accept or reject the findings (Section 430, Civil Practice Act; *Learned* v. *Tillotson*, 97 N. Y. 1).

Restraint by a Judge Is as Inadmissible as Restraint by an Administrative Officer

The opinion of Judge Fuld seems to have rested on the premise that restraint by a judge after trial is not the same as restraint by an administrative officer. But *Near* stands for exactly the contrary position. In taking that position, the majority of this Court overruled the minority whose dissent was also that a judge's restraint is not that of an administrative officer.

Subsequently, in the *Cantwell* case, this Court reaffirmed that view with the observation:

> "Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. *A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.*" (Emphasis supplied.)

This can be only right, for we have seen the effect of the operation of the injunctive procedure from its inception, which culminates in the seizure and destruction of a book that has not yet been presented to the public.

It is not intended to be disrespectful by asking in what manner can a judge claim more competence in this field of obscenity than any other be he administrative official or private citizen? There are no experts as to what is obscene or not. With the marked eagerness with which courts shift questions of fact to administrative officials on avowals of expertness, it might even be said that such officials have been regarded more reliable by the judiciary as experts in certain fields.

Moreover, the administrative official today, may be a judge tomorrow.

In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, at p. 251, Justice Holmes said:

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt."

had to choose between the social evil that was protected in *Near* and the publications in this case, the lesser evil would be the publications involved here. Nevertheless, the *Near* disseminations were protected from prior restraint.

No Exceptions Against Prior Restraint Appear

The prior restraint doctrine, Cooley (2 Cooley, Constitutional Limitation, 8 Ed. p. 885) points out exists for the purpose of avoiding the licensor or censor. The field of obscenity, like the field of sedition in another day has the zealous attention of the censor today. Prior restraint must be avoided in cases of obscenity as in cases of sedition, and whether by administrative officer or by court.

Would this Court at this date countenance a law whereby a publisher would be required to submit a book to censor for his examination and approval against obscenity? If not, then there is no rational justification for countenancing prior restraint by a judge who decides if the book is free from obscenity. Since the similarity in prior restraint exists as to both public officials, the logical conclusion follows that both restraints are bad.

Although the Court in *Near* attempted through dicta to catalog exceptions to the rule, it is submitted that such list was not fully analyzed. Certainly, nothing was said to support the dicta that obscenity does not enjoy protection. No authority was suggested, nor was the statement pursued with any comprehensive treatment.

There is no basis for the making of obscenity an exception. Other evils were sought to be eradicated by prior restraint yet this Court did not allow them. Some of the

evils are libels (*Near*) littering of the streets with pamphlets (*Schneider* v. *State*); expected disorderly conduct (*Hague* v. *C.I.O.*); religious incitements (*Kunz*). There can be no rational basis for excepting obscenity. If such basis exists, none has been presented. *A fortiori*, books asserted to be obscene are entitled to greater protection. There is too much doubt and *ad hoc* legislation attending the application of the amorphous definitions of obscenity. (See, for example, Lockhart and McClure (*op. cit.*), Minnesota Law Rev. March, 1954 p. 320 where the authors state in their exhaustive study, "No one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature." See also at page 352, "An Open Question"; and Judge Frank in *Roth* v. *United States*, No. 582, to be argued jointly with this case.) Since these shifting appraisals of obscenity are placed in the hands of an equity judge, the danger from prior restraint is as great as on the day the First Amendment was adopted to protect against such evils.

The Doctrine Is Necessary in Cases of Claimed Obscenity

Since the injunctive procedure, as above outlined has the effect of enabling a judge to assess the book and condemn it to the flames before it sees the light of the public's eye, it follows that the doctrine against prior restraints must be applied.

To permit this statute to survive, not only is the public denied its constitutional right to read and evaluate, but it also prevents the book from establishing its effect on the community.

A Publication Must Be Shown to Probably and Imminently Create an Evil Before Punishment

In *Dennis* v. *United States*, 341 U. S. 494, it was decided that in order to punish for words, it must be shown with sufficient probability that the words would lead to some overt anti-social conduct.

Such proof has not been tendered in this case. The state of learning in this respect is at best obscure and doubtful. Experts who have approached the subject have reached conclusions as wide apart as the poles.

See in this respect the research study made by Jahoda and staff, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate, cited in by Court of Appeals (R. 81, note 3), and as further clarified and elaborated by Judge Frank in *Roth* v. *United States, supra.* The conclusions made are that the effect of obscene literature on adults has not been scientifically demonstrated. Research indicates that there is no evidence to justify the assumption that reading such literature leads to anti-social actions. See also, Lockhart and McClure, 20 Law and Contemporary Problems, 587, 595; Alpert, Judicial Censorship of the Press, 52 Harvard Law Review, 40, 72; Judge Bok in *Commonwealth* v. *Gordon*, 66 Pa. D & C 101; *State* v. *Lerner*, 51 Oh. L. Abs. 321, 337; *Parmelee* v. *United States*, 113 Fed. (2d) 729).

Since the element of causality is lacking between the words of the book and probable anti-social action flowing therefrom, it follows that this publication is protected at least from prior restraint.

If this book were freed from prior restraint and permitted to circulate, it would enable a court or a community to determine its effect on conduct. In which case a different problem would arise than here presented.

This Action Is Not One for the Abatement of a Nuisance

Nor can this statute be deemed supported by common law jurisdiction of injunction for abatement of nuisances (see opinion f. 194). *Lawton* v. *Steele*, 152 U. S. 133. Books have never been deemed to be within the category of a nuisance. On the contrary, they have a preferred status of protection under the Constitution. *Thomas* v. *Collins, supra; Beauharnais* v. *Illinois, supra.* As early as the *Bandreth* case and as recent as *Near* it was made clear that injunction against publications is not within the category of common law actions. The history of the doctrine against restraints of speech amply explains that in a democracy speech must be kept free from official supervision.

CONCLUSION

In this case the Court faces an issue of crucial importance to the doctrine of prior restraint. The decision must either reaffirm the doctrine against prior restraints or else weaken it. Nothing can be argued in favor of placing obscenity in a special category that would not fit any other character of publication. In the cited pertinent cases, it was a social evil claimed to be derived from speech that was sought to be abated.

The cry now for prior restraint of another form of evil through publication should not receive any better reception than the others fared. A decision against the appellants, placing "obscenity" in a special category would make fair game for a destruction of the doctrine, because no special reason can be found to isolate obscenity.

Respectfully submitted,

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In *United States* v. *Alpers*, 338 U. S. 680, at p. 686, it was said by Justice Black, dissenting, with the concurrence of Justices Frankfurter and Jackson:

> "People of varied temperaments and beliefs have always differed among themselves concerning what is 'indecent.' Sculpture, paintings and literature, ranked among the classics by some, deeply offend the religious and moral sensibilities of other. And those which offend, however priceless or irreplaceable, have often been destroyed by honest zealots convinced that such destruction was necessary to preserve morality as they saw it."

POINT III

All publications whether "obscene" or not are entitled to protection from prior restraint.

Up to this point it has been the contention of appellants that the statute works a prior restraint, and that an injunction order and a direction for seizure and destruction of the publication is nevertheless a prior restraint.

It is appellants' further contention that such restraint offends the Constitution even when a judge finds the publication "obscene" (assuming workable definition can be given to the word).

There are no cases in this Court that have decided that the doctrine against prior restraint does not apply to cases of claimed obscenity. No case has been decided on the basis of a finding of such fact. Nor is there any historical showing of prior restraints against publications of such a character, unless one were to lump it with the early evils

of restraints by licensors against seditious utterances, against which it was shown in Point I, the First Amendment was adopted.

Dicta as to Obscenity

While in the *Near* case by way of dictum, language is found that obscene publications are not protected, nevertheless, the dictum has never been applied or clarified. See, Lockhart and McClure, The Law of Obscenity, and the Constitution, Minnesota Law Review, March, 1954; p. 352, under "An Open Question"; also, 22 University Chicago Law Review, 222, Note 46; The Doctrine of Prior Restraint, by Thomas I. Emerson, 20 Law and Contemporary Problems, 648 at 661.

The dictum in *Near* contains two obscurities. First, the statement that obscene publications are not constitutionally protected could have meant that the publisher or distributor of the publications might be punished, as was the situation in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, and *Winters* v. *New York*, 333 U. S. 507. This would leave untouched the doctrine against prior restraints. The *Near* dictum, which was followed in *Chaplinsky* and *Winters*, simply holds, therefore, that the publisher and distributor of such publications may be punished (cf. *Doubleday & Co., Inc. v. New York*, 335 U. S. 848, and *Beauharnais* v. *Illinois*, 343 U. S. 250).

A second obscurity of the dictum is found in the subsequent joinder of the obscene with the *libelous* as in *Chaplinsky* and *Beauharnais* as not being constitutionally protected. Although in the *Near* case the libel was most offen-

sive, this Court, nevertheless decided that such publications could not be restrained from being distributed or from being published in the future. Yet in *Chaplinsky* and *Beauharnais* it permitted punishment.

The *Chaplinsky* and *Beauharnais* cases reveal, however, that although libel cannot be enjoined because of *Near*, nevertheless, they may be punished. This marked difference would apply in all cases, so that one can say that prior restraint is forbidden even if punishment is available.

Those cases also indicate the problem of the Court in wrestling with "libel", to equate it as an evil comparable to obscenity. Yet *Near* prevented the restraint of libel. If they are equated then it follows that obscenity is entitled to the same freedom from prior restraint as libel.

The dicta in those cases, therefore do not clarify whether they apply to prior restraint or subsequent punishment.

In any event, dicta even if clear is not decisive of a case. Since the fact of obscenity was not before the Court in those cases, the concept was not carefully analyzed or stated.

The Evil in *Near* Was Greater Than in This Case

If one is drawn into comparing the social evils to be restrained it could be argued with great force that the libels of a race, and incitements against persons of that race in *Near* presented a much greater social evil than the publications in this case. Yet this Court refused to permit such inflammatory publications to be restrained.

There are many persons who would regard the publication in the *Near* case a much greater evil to society than the publications here. In *Near*, the publication screamed against and aroused hatred against a whole race and people. The publications before this Court, at the worst, can be regarded as "sexy." Given a choice between evils, many persons would regard the latter less offensive than the former. The fulminations of the *Near* publication were the fulminations of Hitler, that slaughtered six million people. The causal effectiveness in social damage by obscene publications has yet to be demonstrated beyond debate.

There is a close alliance between defamatory statements and obscenity. Not only is their commonness one of offensive utterances, but both have been the subject of dicta, that they are not constitutionally protected (see *Winters* v. *New York*, 333 U. S. 507; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568). Therefore, the *Near* case and its antecedents is important to a decision in this case.

The dissenting justices in *Near* made clear that they saw no difference between the evil of libel and obscenity (p. 737), both offenses were the subject of the Minnesota Statute.

In fact, since *Doubleday & Co.* v. *New York*, 335 U. S. 848 and *Beauharnais* v. *Illinois*, 343 U. S. 250 there is even considerable doubt as to the application of the dicta even as to cases where punishment alone is involved.

But there can be no escape from what was decided in *Near*. The analogy of the offensiveness of the tirades in *Near* to the adjudged obscene in this case is so logical that the conclusion follows that *Near* decides this case. If one

Court in *Near* frustrated such legislative action The *Near* case is therefore an answer to Justice Frankfurter.

The *Beauharnais* case illustrates the point. There, criminal sanction was invoked against the utterance of a libel against a race. The criminal sanction was sustained. Yet in *Near* the suppression of a libel against a race and others by injunction was frustrated by this Court.

(6)

The only issue raised by appellants here and in the courts below is that the statute operates as an unconstitutional prior restraint.

Appellants do not associate themselves with the additional points raised in the brief of the supporting *amicus curiae*. Those points were waived either expressly or implicitly below and in the jurisdictional statement.

On page 42 of "Brief of Appellants" a point is made that there must be a causal connection between the utterance and anti-social conduct resulting therefrom. By this, appellants do not raise any point other than prior restraint. The "causality" argument was made to illustrate that suppression of a book before distribution results in not only denial of the public to appraise, but also prevents study of the effect of the publication on the community.

One last word,—reference was made by the court below and by opposing counsel to the fact that appellants "concede" that the publication is obscene. This is an inadvertence. Appellants merely did not challenge the finding of the trial court and the conclusion of the Court of Appeals that such was the character of the book. In resting appel-

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Appellants,

—v.—

PETER CAMPBELL BROWN, CORPORATION COUNSEL OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANTS

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SUPPLEMENTAL BRIEF OF APPELLANTS

At the argument certain points were raised, which for lack of available time for oral argument were not comprehensively treated. This supplemental brief proposes to tie together some of the argument.

(1)

So far as suppression is concerned there is no difference between suppressing the publishing of a book or suppressing its distribution.

The point to be remembered is that suppression is directed against an *existing* book. The problem would be akin to a species of suppression more familiar to the Court in recent years, *i.e.*, the suppression of a motion picture by a governmental agency, by forbidding its *distribution*.

That the protection of distribution is on a par with the protection of publication has been well-articulated by this Court in a number of cases, prominent among them being *Lovell* v. *Griffin*, 303 U. S. 444.

Were this a novel proposition to be demonstrated, then the following would be pertinent:

Censorship is impossible against an *idea* that resides only in the mind of the author. Only after his ideas are uttered, or in manuscript can suppression function. In the case of a book suppression can start with the manuscript. It can be suppressed at every other stage, such as at the typesetting, at the printing, at the binding, or at the storage stage for sale and distribution.

The statute in question deals with the storage stage, where a person possesses or is about to acquire possession for the purpose of sale or distribution. Wherein lies the difference between suppression at the printing or publication stage from that of keeping the book ready for sale or distribution? The answer must be that there is no difference. Suppression means prevention of its utterance to the world and this can be done at any stage.

So too, is there no difference between possession by a printer or publisher for the purpose of sale and that of possession for a like purpose by a dealer. The statute makes *no* distinction. Nor can there be any. The dealer is merely a conduit for the utterance. The printer or publisher could eliminate the dealer and make distribution himself to the public. He would thus fall under the strictures of the statute. Both statute and reason, therefore, make no distinction between a "publisher" or a "dealer".

Suppression therefore may follow from the inception of the utterance of the author's ideas to the time of sale. Sales themselves may be evidentiary of the fact that the books were available for the purpose of sale.

(2)

There is no distinction in principle between suppression of existing or future publications.

Here again, it is the fact of suppression of a publication that is all-important. Appellants are not concerned with the aspect of the *Near* case which was disciplinary in character, in that *Near* was forbidden to publish in the future because he had offended in the past. Appellants are only concerned with the aspect of censorship in *Near* as to *existing* publications and which was subsequently the basis of decision in the numerous cases that found support in *Near*, such as the cases cited in "Brief of Appellants" pages 18-25.

What is important is that an existing publication, like the familiar existing motion picture is being deprived of circulation by governmental fiat. This, we have argued the First Amendment forbids.

While on the subject of suppression the Court's attention should be directed to the existence of a concession by appellee in his brief (top of page 7) that the order to show cause that instituted the application for a temporary injunction contained a stay, which restrained appellants from distributing or selling, or acquiring for the purpose of sale, the publications in this case. This concession is noted because the papers seeking the temporary injunction were not incorporated in the record (R. 39).

(3)

English cases do not explain or control the First Amendment.

In the cases submitted in "Brief of Appellants", page 12, it will be found that the First Amendment was enacted for the very purpose of overcoming what was deemed abuses of English laws in the field of expression.

Therefore, though our debt to the common law is great, our Constitution nevertheless, indicates a break in the field of free speech. It follows that *Regina* v. *Hicklin*, 3 Q. B. 360 is not an authority or even a guide to decision here. That case has been repudiated even as a common law signpost. (*Halsey* v. *New York Society for the Suppression of Vice*, 234 N. Y. 1; *United States* v. *Kennerley*, 209 Fed. 119.)

Since the First Amendment controls over English practices, that case cannot be considered as an authority paramount over our own constitutional traditions.

(4)

No judicial safeguards are involved in a case of suppression.

At the argument, Mr. Justice Frankfurter indicated that judicial safeguards distinguished suppression by a judge from suppression by an administrative official.

But there are no judicial safeguards involved here. A book is placed in evidence and judge decides whether it offends the statute. The administrative official examines the book in evidence and makes a determination whether it offends the statute. Where are the necessary constitutional safeguards? In which way is the judge more qualified than the administrative official?

Of course, there may be a right of appeal from an administrative determination. So may there be an appeal from a judge. But this does not add any distinction. See, *Cantwell* case, cited page 34, "Brief of Appellant."

The answer, in short, is that *Near* decided that suppression by the judiciary was as repugnant to the Constitution as suppression by an administrative official. The *Near* case has been followed with increasing respect over the years, and it has become a landmark in the field of freedom of speech. What was there decided cannot be lightly ignored at this time.

The distinction recognized by this Court between a hearing and determination by an administrative officer and that by a court was remarked by Mr. Justice Frankfurter. But those cases do not deal with freedom of expression. The *Near* case implicitly makes that clear.

(5)

The legislature may not provide for suppression where the Constitution forbids.

At the argument, Mr. Justice Frankfurter with a glance at *Beauharnais* suggested that the legislature may step in to resolve the mischief that may be created by speech that may influence persons.

This was remarked in connection with counsel's argument that the libels against a race in *Near* which this Court denied suppression by injunction could be equated as an evil with obscenity, and therefore both cases are on a par, in that respect.

But the Minnesota legislature had undertaken to suppress what it thought the Constitution permitted. Yet this

lants argument solely on "prior restraint" we necessarily assume the books to be as characterized.

April 25th, 1957

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Appellants
60 Wall Street
New York 5, New York

[34,985]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, and MARTIN KLEINBERG,

Appellants,

against

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

PETER CAMPBELL BROWN,
Corporation Counsel
of the City of New York,
Attorney for Appellee,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
FRED ISCOL,
of Counsel.

June 11, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 970

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, and MARTIN KLEINBERG,

*Appellants,**

against

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

*Appellee.***

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Preliminary Statement

The above-named appellants—defendants in the action—have appealed from a judgment of the Court of Appeals of the State of New York, entered April 27, 1956, which unanimously affirmed a judgment entered on a decision in

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* Of the original defendants other than those here named, Metropolitan Book Shop, Inc. and Philip Pellegrino did not appear, although served with process; Anne Goldberg was deceased at the time of the trial; and Publishers Outlet and Gordon Law were not served with process (Record below, pp. 73-74, footnote).

** The action was originally instituted in the name of Adrian P. Burke, the then Corporation Counsel. On his resignation to accept the office of Judge of the New York Court of Appeals, his successor, Peter Campbell Brown, was substituted as plaintiff (Record below, p. 73, footnote).

favor of the plaintiff, rendered after a trial without a jury before Mr. Justice MATTHEW M. LEVY at a Special Term of the New York Supreme Court, New York County.

The judgment entered on the decision of Special Term enjoined the defendants from distributing, selling or acquiring possession of volumes 1-14 of a publication entitled "Nights of Horror" and directed that copies of such volumes in the possession of the defendants be turned over to the City Sheriff of the City of New York for destruction.

The judgment entered on the decision of Special Term was taken on direct appeal to the Court of Appeals pursuant to § 588, subd. 4, of the New York Civil Practice Act (set forth *post*, p. 12), which permits such direct appeal "where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States", and which provides that "on any such appeal only the constitutional question shall be considered and determined by the court."

The statute pursuant to which the action below was prosecuted is § 22-a of the New York Code of Criminal Procedure (New York Laws 1941, chap. 952, as amended by Laws 1954, chap. 702). A copy of the statute is set forth *post*, pp. 11-12.

The opinion, constituting also the decision, of the Special Term, is reported in 208 Misc. 150 and is also found at pp. 44-74 of the Record on Appeal below. The New York Court of Appeals, while unanimous in its affirmance of the judgment entered on the decision of Special Term, handed down two separate opinions: one, written by Judge FULD and concurred in by Judges DYE and VAN VOORHIS; the other, written by Judge DESMOND and concurred in by Chief Judge CONWAY and Judge FROESSEL. The two opinions are reported in 1 N. Y. 2d 177 and are also to be found in Appendix B hereof (*post*, pp. 13-26).

Statute Involved

Section 22-a of the New York Code of Criminal Procedure is set out in full *post*, pp. 11-12. Its provisions are summarized by Judge FULD (Opinion, *post*, pp. 13-14) in these words:

> "Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the [New York] Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces 'any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting.' It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who 'sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute' any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to 'surrender' the offending matter to the sheriff who 'shall be directed to seize and destroy the same' (subd. 3)."

The Pleadings

(1)

The action was commenced on or about September 10, 1954. The complaint alleged that the plaintiff was the Corporation Counsel of the City of New York and that § 22-a of the New York Code of Criminal Procedure em-

powered him to maintain an action for an injunction against any person who distributed written or printed matter of an indecent character or which is obscene, lewd, lascivious, filthy, indecent or disgusting (fols.* 20-21).

Upon information and belief, each of the defendants was alleged to be a person who sells, or is about to sell, or has in his possession, or distributes, or is about to distribute a publication entitled "Nights of Horror". All of the issues of such publication were alleged to be obscene, lewd, lascivious, filthy and disgusting and in violation of law. Issues 1-14 of "Nights of Horror" were annexed to the complaint as exhibits. The relief requested was a judgment (1) enjoining the defendants from acquiring, distributing, or selling any issues of "Nights of Horror", and (2) directing the defendants to surrender to the Sheriff any issues of such publication within their control; and (3) directing the Sheriff to seize and destroy the same.

(2)

The defendants Kingsley Books, Inc., Martin Kleinberg, and Louis Finkelstein—the instant appellants—submitted an answer (fols. 28-32) which, as subsequently amended at the trial (fols. 50-51), admitted that they had in their possession for sale or distribution issues of "Nights of Horror".

The answer denied the allegations of the complaint that such issues were obscene, lewd, lascivious, filthy, indecent and disgusting (fol. 30). As affirmative defenses the answer asserted that § 22-a of the Code of Criminal Procedure is unconstitutional and that the Charter of the City of New York precludes plaintiff from bringing this action. This latter defense was withdrawn on the trial by the defendants Kingsley Books, Inc. and Martin Kleinberg (fol. 123). No point was made in this regard in appellants' brief to the Court of Appeals nor is it made here.

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* Folio references are to the Record on Appeal in the New York Court of Appeals.

The Evidence

Francis X. Cain, a detective in the New York City Police Department, called as a witness for the plaintiff, testified that on August 23, 1954, he visited the premises occupied by defendant Kingsley Books, Inc. on the ground floor at 220 West 42nd Street (fol. 56). Volumes 1 to 16 of "Nights of Horror" were on display; between 10 and 25 copies of each volume were on hand, the copies of each volume being kept in a separate stack (fols. 62-63). He purchased copies of volumes 2, 5 and 7 and paid $6 for them to an unidentified person who he subsequently learned was the defendant Martin Kleinberg (fols. 62, 64). On August 25, 1954, he returned to the premises and purchased copies of volumes 3 and 4 of "Nights of Horror", paying $4 for them. Martin Kleinberg was present on the second occasion but he was not the person to whom the money was paid (fols. 64-65).

Volumes 1 to 14 of "Nights of Horror", which were identified by the witness as having been on display at the premises on both August 23 and 25, were received in evidence without objection (fols. 66-67).

On September 10, 1954, the witness returned to the premises of Kingsley Books, Inc. with another policeman and pursuant to a court order took an inventory of the entire store and the cellar. The inventory listed approximately 2650 copies of volumes of "Nights of Horror" (fols. 72-73).

The witness further testified that on August 17, 1954, he visited the premises occupied by the defendant Metropolitan Book Shop, Inc., on the ground floor of 1133 Sixth Avenue (fols. 25-76). About five or six volumes of "Nights of Horror" were on sale. He purchased copies of volumes 9, 11 and 14 and paid $9.27 for them. On August 18, 1954, he went back to the same place and purchased copies of volumes 12 and 13 for $6.18 (fols. 77-80). On September 10, 1954, he returned to the premises and, pur-

suant to court order, made an inventory of "Nights of Horror", listing 31 copies of various volumes (fols. 80-81; Pltff's Exh. 3, not printed).

James Rushin, a detective in the New York City Police Department, testified that on September 9, 1954, he visited the Times Square Book Shop, located at 225 West 42nd Street. Sixteen different issues of "Nights of Horror" were on display, about forty or forty-five copies in all. He bought one copy for $2 (fols. 93-96). On September 10th, he returned and took an inventory which listed 234 copies of "Nights of Horror" (fols. 97-98; Pltff's Exh. 4, not printed).

James J. McCarthy, also a detective in the New York City Police Department, was the last witness. He testified that on September 9, 1954, he went to the Pelley Book Shop on the street level at 790 Eighth Avenue. Volumes 1 to 12 of "Nights of Horror" were on display and he bought one for $4. While he was there, Philip Pellegrino, one of the defendants, came in and identified himself as the owner of the shop (fols. 101-104). On September 10, 1954, he returned to the shop and made an inventory listing 16 copies of "Nights of Horror" (fols. 104-105; Pltff's Exh. 5, not printed). Pellegrino defaulted in appearance on the trial (see *supra*, footnote p. 1) and did not appeal from the judgment entered on the decision of Special Term.

It was conceded that the Times Square section, in which are located all the book shops as to which the witnesses testified, is a high-traffic area, attracting teenagers, middle-aged persons, old people, and persons from out of town (fols. 111-112).

ARGUMENT

The challenge to the constitutionality of § 22-a of the New York Code of Criminal Procedure presents no substantial Federal question since:

(a) The appellants do not question the definiteness of the statutory standard laid down by the statute in respect to obscene publications;

(b) The appellants concede that the books they sold and held for sale are in fact obscene;

(c) The statute does not involve a prior restraint on publication but only the infliction of penalties after publication, with appropriate procedural protection for those sued under it; and

(d) Even if there were some element of prior restraint, it is clear that such restraint is constitutionally permissible with respect to obscene publications.

(1)

The cases which have come before this Court for review with respect to the constitutionality of legislative enactments dealing with obscene matter have in practically every instance dealt with either (1) the asserted vagueness and indefiniteness of the standard to be applied by the Court or administrative agency charged with enforcement, or (2) the question of whether the offending matter falls within one of the categories proscribed by the statute.

The instant case poses neither of these issues. Judge Fuld in his opinion below refers (see Opinion, *post*, p. 15) to the appellants as "not questioning the definiteness of the statutory standard, [and] not challenging the test of obscenity applied by the trial judge"; and, after stating

(p. 14) that "The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy," continues with the comment that the "Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the [New York] Penal Law [§ 1141], no constitutional argument could successfully have been leveled against resulting convictions." Judge DESMOND, in the other opinion handed down by the Court of Appeals, states (*post*, p. 25) that the "Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been enjoined, are obscene."

If the question of the definiteness of the statutory standard were open to the appellants in this Court, it is clear that an attack on the statute on that ground would, in any event, be without merit. The standard set up by § 22-a—"obscene, lewd, lascivious, filthy, indecent or disgusting"—is a valid and adequate one. See the numerous cases cited by Judge DESMOND in support of this proposition (Opinion, *post*, p. 26); particularly *Winters* v. *New York*, 333 U. S. 507 (1948), where this Court indicated (at p. 518) that this very language is sufficiently "well understood from long use in the criminal law" to satisfy the due process requirements of definiteness and certainty, and actually (at p. 520) pointed to a legislative provision containing this language as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications."

On what then do the appellants rely in their appeal to this Court? As Judge FULD notes (Opinion, *post*, p. 15) their "sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional 'prior restraint,' interfering with freedom of speech and press." Judge DESMOND, likewise, states (Opinion, *post*, p. 25) of the appellants that "Their sole assertion in this court is that section 22-a is unconstitutional because * * * any and every

prior restraint on the publication or sale of obscene literature violates the First Amendment.'"*

Taking up this sole contention of the appellants, we note initially that, as Judge FULD points out (Opinion, *post*, p. 17), "no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the [New York] Penal Law.". And, as Judge DESMOND remarks (Opinion, *post*, p. 26), "No one claims that section 22-a lacks appropriate procedural protections for those sued under it."

Judge FULD in his opinion subjects the statute to a careful analysis and concludes (Opinion, *post*, p. 21):

> "There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well on as the law (Civ. Prac.

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* The provision of the statute (subd. 2) directing the Court to render its decision "within two days of the conclusion of the trial" is not before the Court since the parties agreed neither to invoke nor insist upon that requirement. See opinion of Judge FULD (*post*, p. 15, footnote 2).

Act, § 584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660)."

We submit, finally, that, even were there an element of prior restraint in the case, there would still be no basis for an attack on the constitutionality of the statute. There is, as Judge DESMOND points out (Opinion, *post*, p. 26), "most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146)."

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

June 11, 1956.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel
of the City of New York,
Attorney for Appellee.

SEYMOUR B. QUEL,
FRED ISCOL,
of Counsel.

APPENDIX A

Section 22-a of the Code of Criminal Procedure

Section 22-a of the Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§ 22-a. Obscene prints and articles; jurisdiction.

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

Cited Provision of the New York Civil Practice Act

"**§ 588. Appeal as of right.** Appeal to the court of appeals lies only

* * * * * *

4. from a judgment of a court of record of original jurisdiction which finally determines an action, or an order of such court which finally determines a special proceeding, where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

APPENDIX B

Opinions of Court of Appeals*

COURT OF APPEALS

STATE OF NEW YORK

PETER CAMPBELL BROWN, *etc.*,
Respondent,
vs.
KINGSLEY BOOKS, INC. *et al.*,
Appellants.

FULD, J. Although we are all agreed for affirmance, we reach that conclusion by somewhat different routes. The importance and perplexities of the constitutional issue presented persuade me that there must be more full discussion than some of my associates believe necessary of the reasons for and the reach of the decision being made.

Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces "any book, magazine,

* The opinions of the Court of Appeals as printed in Appellants' Statement as to Jurisdiction (Appendix A, pp. 7-21) do not reflect minor changes made after release of the unrevised opinions.

pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting". It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who "sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute" any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to "surrender" the offending matter to the sheriff who "shall be directed to seize and destroy the same" (subd. 3).

The present suit, instituted by the Corporation Counsel of the City of New York against a number of book sellers with premises in that city, concerns a series of paper-bound booklets collectively entitled "Nights of Horror". Members of the police force testified at the trial that the booklets had been displayed for sale in defendants' stores and that they had purchased a number of copies from the various defendants, at prices ranging ~~from~~ $2 to $4 each. The publications themselves were also introduced in evidence. The trial judge, in a carefully considered opinion, found that the booklets were plainly obscene and pornographic, "dirt for dirt's sake", and held that the statute did not violate any constitutional guarantee. He thereupon granted judgment (1) permanently enjoining defendants from distributing, selling, or acquiring possession of such publications, (2) requiring them forthwith to surrender to the sheriff for destruction all copies in their possession and (3) directing the sheriff to seize and destroy such copies, in the event of defendants' failure to surrender them.

The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy. Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity

provisions of the Penal Law, no constitutional argument could successfully have been leveled against resulting convictions. Indeed, not questioning the definiteness of the statutory standard, not challenging the test of obscenity applied by the trial judge, who concluded that the booklets were obscene under any of the judicially announced criteria and not objecting to the failure to require a jury trial,[1] defendants' sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional "prior restraint," interfering with freedom of speech and press (U. S. Const., 1st and 14th Amendts.; N. Y. Const., art. I, § 8).[2]

There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 501-502; see, also, Chaffee on Free Speech in the United States [1941], p. 545), that it protects distribution as well as initial publication (see *Lovell* v. *Griffin*, 303 U. S. 444; *Grosjean* v. *American Press Co.*, 297 U. S. 233) and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas. (See *Winters* v. *New York*, 333 U. S. 507, 510; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 153.) While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find

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[1] It may be well to note that in a criminal prosecution based upon section 1141 of the Penal Law, involving as it does a misdemeanor charge, the defendant is not entitled to a trial by jury as a matter of constitutional right. (N. Y. Const., art. VI, § 18; see *People* v. *Kaminsky*, 208 N. Y. 389, 394; *People ex rel. Cosgriff* v. *Craig*, 195 N. Y. 190, 195-196; see, also, N. Y. City Crim. Cts. Act, § 31, subd. 1, pars. [b], [c].)

[2] Nor do we concern ourselves with the further provision of the statute directing the court to render its decision "within two days of the conclusion of the trial" (subd. 2), in view of the fact that the parties agreed neither to invoke nor insist upon that requirement.

justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Joseph Burstyn, Inc.*, v. *Wilson, supra*, 343 U. S. 495, 502-504; *Feiner* v. *New York*, 340 U. S. 315, 319; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Winters* v. *New York, supra*, 333 U. S. 507, 509; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98, 105.)

That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter,[3] at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court (see *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd., by equally divided court, 335 U. S. 848; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Pesky*, 254 N. Y. 373; *People* v. *Muller*, 96 N. Y. 408) and by the United States Supreme Court. (See *United States* v. *Alpers*, 338 U. S. 680; *Winters* v. *New York, supra*, 333 U. S. 507, 510, 518, 520; *United States* v. *Limehouse*, 285 U. S. 424; see, also, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266.) Imprecise though it be—its "vague subject-matter" being largely "left to the gradual development of general notions about 'what is decent'" (per L. HAND, J., *United States* v. *Kennerley*, 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard. Indeed, in the *Winters* case (*supra*, 333 U. S. 507), the court not only indicated that collocation of the very words found in section 1141 of our Penal Law, "obscene, lewd, lascivious, filthy, indecent or disgusting",

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[3] It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, e. g., Jahoda and Staff of Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)

is sufficiently "well understood through long use in the criminal law" to satisfy the due process requirements of definiteness and certainty (333 U. S., at p. 518), but actually pointed to the provision as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications" (333 U. S. at p. 520).[4]

Thus, by virtue of section 1141, it has long been a misdemeanor in this state, punishable by imprisonment or fine or both, to sell or distribute any written or printed obscene material of the kind described in section 22-a of the Code, and similar statutes are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chicago L. Rev. 216). The legislature, however, apparently concluded that such penal sanctions were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised. (Cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, N. Y. Legis. Doc., 1954, No. 37, pp. 31-32.) Whether or no the legislature acted wisely is, of course, no concern of the courts. Our inquiry is limited to whether its act transcends constitutional limits.

As already noted, no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the Penal Law. What the statute does is to provide an additional sanction against the dissemination of obscene matter.

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[4] Application of the standard may, perhaps, raise constitutional questions in individual cases (cf. *Doubleday & Co.* v. *New York*, 335 U. S. 848, affg., by equally divided court, 297 N. Y. 687, *supra*; *Roth* v. *Goldman*, 172 F. 2d 788, 792, per FRANK, C. J., concurring; see Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295), but the present is not such a case.

It is, however, defendants' position that the constitution limits the state to the imposition of punishment, and that distribution of the writing itself may not be prevented. An injunction, such as the present one, even though it is issued after publication and after a judicial trial, is characterized as such suppression and censorship as to stamp it an impermissible "prior restraint." In other words, it is urged that as long as the publisher or vendor of a writing is willing to risk the imposition of crimnal penalties he has an absolute right to proceed with its publication or distribution and any restriction of that right is unwarranted, since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The major, though not exclusive, purpose of the guarantee of free expression, it has been observed, is "to prevent previous restraints upon publication." (*Near* v. *Minnesota, supra*, 283 U. S. 697, 713; *Joseph Burstyn, Inc.*, v. *Wilson, supra*, 343 U. S. 495, 503.) Though difficult of exact formulation (see Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems 648), this principle of immunity from prior restraint has been applied by the United States Supreme Court in a variety of situations to strike down licensing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion. (See, e.g., *Poulos* v. *New Hampshire*, 345 U. S. 395; *Kunz* v. *New York*, 340 U. S. 290; *Niemotko* v. *Maryland, supra*, 340 U. S. 268; *Cantwell* v. *Connecticut, supra*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147.) As has been pointed out, however, "the protection even as to previous restraint is not absolutely unlimited", although the limitation has been recognized "only in exceptional cases". (*Near* v. *Minnesota, supra*, 283 U. S. 697, 716; see; also, *Joseph Burstyn, Inc.*, v. *Wilson, supra*, 343 U. S. 495, 504.)

The Supreme Court has asserted, by way of dictum, that the control of obscenity presents such an exceptional case. In *Near* v. *Minnesota* (*supra*, 283 U. S. 697, 716), Chief Justice HUGHES, in discussing certain extraordinary areas exempt from the sweeping prohibition against prior restraint, stated that one of the exceptions was that "the primary requirements of decency may be enforced against obscene publications", and similar reservations have also been expressed elsewhere. (See *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 571–572; *Lovell* v. *Griffin*, *supra*, 303 U. S. 444, 451; see, also, Chafee, *op. cit.*, p. 10.) But the precise issue whether restraints in advance of publication may be applied to obscene matter has not yet been squarely decided. Questions involving the validity of state systems of censorship of motion pictures have on several recent occasions come before the Supreme Court, but in each instance the case has been disposed of by striking down some particular standard or criterion on the ground that it did not satisfy the minimum requirements of definiteness and certainty. (See *Superior Films* v. *Department of Educ.*, 346 U. S. 587; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; cf. *Holmby Productions* v. *Vaughn*, 350 U. S. 870.) The court has specifically left open the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." (*Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 505–506.)[5]

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[5] I do not believe that *Holmby Productions* (*supra*, 350 U. S. 870) answers this question. The Kansas statute there considered provided for the banning of any motion picture found by the state's board of review to be "obscene, indecent or immoral, or such as tend to debase or corrupt morals". The film, "The Moon is Blue", while labeled by the board as "obscene," as well as "indecent and immoral," was specifically condemned for the following stated reason: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as

(Footnote continued on following page)

We are not, in my opinion, required in this case to decide categorically the validity, under all circumstances, of any and every prior restraint aimed at obscene matter, regardless of the nature and scope of the regulatory measure employed or of the particular medium of expression involved. While strong objections have been voiced against any practice of general censorship, even in the area of obscenity, and whether administered by an executive agency or a judicial tribunal (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 661, 670–671; Rice, The Supreme Freedom: Three Hundred Years After Milton, pp. 105, 111–112, contained in Great Expressions of Human Rights, edited by R. M. MacIver, published in 1950 by Institute for Religious and Social Studies; cf. *Superior Films* v. *Department of Educ.*, *supra*, 346 U. S. 587, 588, per DOUGLAS, J., concurring), that broad question is not here presented. Sharp and precise lines cannot always be drawn between permissible and nonpermissible regulatory measures in the realm of expression. (See *Winters* v. *New York*, *supra*, 333 U. S. 507, 518; *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 517–518, per FRANKFURTER, J., concurring.) Whatever might be said of a scheme of advance censorship directed against all *possibly* obscene writings, the case before us concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees.

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their theme." The Supreme Court reversed the judgment of the Kansas high court which had accepted the board's interpretation of the statute as well as its determination (177 Kan. 728). It is our surmise that this decision of the Supreme Court—reflected in a *Per Curiam*, merely citing *Burstyn* (*supra*, 343 U. S. 495) and *Superior Films* (*supra*, 346 U. S. 587)—turned solely on the wide reach and the essential vagueness of the standard employed by the Kansas court. Since any film could apparently be banned as "obscene, indecent or immoral" if a sex theme predominated, the term "obscene" was no narrower, no more definite or certain, than the criteria previously stricken as too vague in the *Commercial Pictures* and *Superior Films* cases (*supra*, 346 U. S. 587).

(Cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650–651.)

There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshhold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well as on the law (Civ. Prac. Act, § 584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling. (See Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660.)

In point of fact, examination of the operation and effect of section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if not more so, to deter publication of an obscene work. (See

Pound, *supra*, 29 Harv. L. Rev., at p. 651; Emerson, *supra*, 20 Law and Contemporary Problems, at p. 660.) In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement; and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt. These words are, of course, limited to the statute before us dealing with obscenity, and nothing here written is to be taken as sanctioning the injunctive process in dealing with other objectionable or antisocial material, such as libel.

The reliance which defendants place upon *Near* v. *Minnesota* (*supra*, 283 U. S. 697) is untenable. That case concerned a Minnesota statute which authorized the issuance of an injunction, in a suit to be brought in the name of the state, against the further publication of any newspaper or periodical adjudged to be "malicious, scandalous and defamatory".[6] Under the statute, any articles deemed to be derogatory to a public officer could be branded "malicious, scandalous and defamatory", if the publisher were unable to establish that they were true *and* "published with good motives and for justifiable ends" (283 U. S., at pp. 709-710). Once such an injunction was issued, resumption of any future printing was banned and punishable as a contempt, unless the publisher was able to satisfy the court as to the character of the new publication. The court would thus be constituted a censor to pass on the contents of future issues in advance of publication, and whether the publisher "would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling" (283 U. S., at p. 712). It was this feature of the law, particularly as applied to newspaper com-

[6] The same statute also authorized an injunction against the further publication of any newspaper or periodical adjudged to be "obscene, lewd and lascivious", but that portion of the statute was not involved in the case.

ment upon matters of public importance, upon ideas in the realm of political expression, that was regarded by the Supreme Court as "of the essence of censorship" and an unwarranted infringement on freedom of discussion (283 U. S., at p. 713).

The features condemned in *Near* are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writings here condemned are unredeemed by even an iota of idea content or of artistic worth. And, unlike the statute in *Near* which sanctioned a general and future restraint, there is here no restraint of any kind on the publication or distribution of material to be written or produced in the future. The corporation counsel in the court below sought to have the statute read as authorizing an injunction against the sale and distribution, not only of any published work found to be obscene, but also of any future work in the same series. This the trial court very properly refused to do.

In short, careful analysis of the operation and effect of section 22-a, in relation to the basic aims and objectives of the constitutional guarantees, is convincing that the limited injunctive remedy here provided may not be condemned as a forbidden prior restraint. As a matter of fact, analogous decisions under the Federal Tariff Act of 1930 (Act June 17, 1930, ch. 497, tit. III, § 305; U. S. Code, tit. 19, §1305) suggest that a measure which prescribes a penalty only after the challenged work has already been published does not involve any aspect of prior restraint at all. The Tariff Act thus provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter upon adjudication after trial that it is obscene. Although the constitutionality of these provisions has apparently never been passed upon by the Supreme Court, the lower federal courts

have uniformily either held[7] or assumed[8] the statute to be constitutional. Thus, in *United States* v. *One Obscene Book Entitled "Married Love"* (*supra*, 48 F. 2d 821), Judge Woolsey rejected the contention that the statute impinged on the right of freedom of the press, noting that it did "not involve the suppression of a book before it is published"; in the course of his opinion, he wrote (p. 822): "After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press."

It is further urged that even publications adjudged to be obscene cannot constitutionally be withheld from free circulation in the market place of ideas; that, apart from the rights of the publisher and vendor, the public itself has the right to read and examine whatever is published and to form its own opinion of a publication's value and propriety. But here, as in other situations, the question is one of balancing the several competing interests involved. As the Supreme Court has emphasized, in reference to the federal statute declaring obscene material nonmailable (35 U. S. Stat. 1129, U. S. Code, tit. 18, former § 334), there is no necessity "to satisfy all tastes, no matter how perverted." (*Hannegan* v. *Esquire, Inc.*, *supra*, 327 U. S. 146, 158.)

In reaching the conclusion which I do, I assume, of course, that the statutory proscription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work

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[7] See *Besig* v. *United States* (208 F. 2d 142); *United States* v. *One Obscene Book Entitled "Married Love"* (48 F. 2d 821, 822).

[8] See *Parmelee* v. *United States* (113 F. 2d 729); *United States* v. *One Book Called Ulysses* (72 F. 2d 705); *United States* v. *One Unbound Volume of Prints* (128 F. Supp. 280).

will be determined by viewing it "broadly as a whole" (*Halsey* v. *New York Soc. for Suppression of Vice*, 234 N. Y. 1, 4-5), with reference to "its dominant effect", "not on any particular class, but upon all those whom it is likely to reach" (*United States* v. *Levine*, 83 F. 2d 156, 157; *United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 707-708, affg. 5 F. Supp. 182); and that consideration will be given, among other factors, to "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient". (*United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 708.) The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same danger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications.

The judgment appealed from should be affirmed, with costs.

Desmond, J. Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been here enjoined, are obscene. They thus concede that the books are such as are subject under section 22-a of the New York Code of Criminal Procedure to an injunction at the suit of the corporation counsel who brought this action. Those concessions leave defendants with one possible ground for appeal and that ground they take. Their sole assertion in this court is that section 22-a is unconstitutional because, say defendants, any and every prior restraint on the publication or sale of obscene literature violates the First Amendment. Since no other question is presented, we must limit ourselves to answering that question. It detracts nothing from Judge Fuld's fine

opinion to point out that its discussion of many other questions not before us on this appeal is not binding on this court.

Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex Parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146). The standard set up by section 22-a, "obscene, lewd, lascivious, indecent or disgusting", is a valid and adequate one (*Winters* v. *New York*, 333 U. S. 507, 518; see *Rosen* v. *United States*, 161 U. S. 29, 42; *Swearingen* v. *United States*, 161 U. S. 446, 451; *Robertson* v *Baldwin*, 165 U. S. 275, 281; U S. Code, tit. 18, § 1461; *United States* v. *Limehouse*, 285 U. S. 424; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, 158, *supra*; *Times Film Corp.* v. *Chicago*, —— F. Supp. ——,* decided March 21, 1956; *People* v. *Muller*, 96 N. Y. 408; *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd. by equal vote 335 U. S. 848; *Commonwealth* v. *Holmes*, 17 Mass. 335).

No one claims that section 22-a lacks appropriate procedural protections for those sued under it.

The judgment should be affirmed, with costs.

Dye and Van Voorhis, JJ., concur in opinion of Fuld, J.; Conway, Ch. J., and Froessel, J., concur in opinion of Desmond, J.; Burke, J., taking no part.

Judgment affirmed.

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* Since reported in 139 F. Supp. 837.

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(35177)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, and MARTIN KLEINBERG,

Appellants,

against

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF.

PETER CAMPBELL BROWN,
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(b) The appellants concede that the books they sold and held for sale are in fact obscene;	
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, and MARTIN KLEINBERG,

Appellants,*

against

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.**

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

Preliminary Statement

The above-named appellants—defendants in the action—have appealed from a judgment of the Court of Appeals of the State of New York, entered April 27, 1956, which

* Of original defendants other than those here named, Metropolitan Book Shop, Inc. and Philip Pellegrino did not appear although served with process; Anne Goldberg was not served with process and was deceased at the time of the trial; and Publishers Outlet and Gordon Law were not served with process (R. 73-74n.)

** The action was originally instituted in the name of Adrian P. Burke, the then Corporation Counsel. On his resignation to accept the office of Judge of the New York Court of Appeals, his successor, Peter Campbell Brown, was substituted as plaintiff (R. 73n).

unanimously affirmed a judgment entered on a decision in favor of the plaintiff—the instant appellee—rendered after a trial without a jury before Mr. Justice MATTHEW M. LEVY at a Special Term of the New York Supreme Court, New York County.

The judgment (R. 12-15) entered on the decision of Special Term enjoined the defendants from distributing, selling or acquiring possession of volumes 1-14 of a publication entitled "Nights of Horror" and directed that copies of such volumes in the possession of the defendants be turned over to the City Sheriff of the City of New York for destruction.

The Court refused, on prior restraint grounds (Opinion, R. 67, 69-70), to enjoin the sale and distribution of *future* issues of "Nights of Horror." Since the plaintiff did not appeal from the judgment, this determination is not before the Court for review. It may be noted also that although the evidence (see R. 21, 96) indicates that volumes 15 and 16 of "Nights of Horror" were offered for sale along with volumes 1-14, the complaint (R. 3) is restricted to volumes 1-14, as is the judgment (R. 13-14) in the action. The failure to include volumes 15 and 16 is not a factor in the appeal since no point is made in connection therewith.

The statute pursuant to which the action was prosecuted is § 22-a of the New York Code of Criminal Procedure (New York Laws 1941, chap. 925, as amended by Laws 1954, chap. 702). A copy of the statute is set forth in an Appendix hereof (*post*, pp. 20-21).

The judgment entered on the decision of Special Term was taken on direct appeal to the New York Court of Appeals pursuant to § 588, subd. 4, of the New York Civil Practice Act (set forth *post*, p. 21), which permits such direct appeal "where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States," and which provides that

"on any such appeal only the constitutional question shall be considered and determined by the court."

The opinion, constituting also the decision, of the Special Term, is reported in 208 Misc. 150 and is also to be found at pages 44-74 of the Record. The New York Court of Appeals, while unanimous in its affirmance of the judgment entered on the decision of Special Term, handed down two separate opinions; one, written by Judge Fuld and concurred in by Judges Dye and Van Voorhis; the other, written by Judge Desmond and concurred in by Chief Judge Conway and Judge Froessel. (Judge Burke took no part in the case.) The two opinions are reported in 1 N. Y. 2d 177, and are also be found at pages 79-91 of the Record.

Probable jurisdiction was noted in the instant case on January 14, 1957, and it, together with *Alberts* v. *State of California* (No. 61), was consolidated for argument with *Roth* v. *United States* (No. 582).

Statute Involved

Section 22-a of the New York Code of Criminal Procedure is set out in full in an Appendix hereof (*post*, pp. 20-21). Its provisions are summarized by Judge Fuld (Opinion, R. 79-80) in these words:

> "Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the [New York] Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces 'any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure,

image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting.' It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who 'sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute' any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to 'surrender' the offending matter to the sheriff who 'shall be directed to seize and destroy the same' (subd. 3)."

The Pleadings

(1)

The action was commenced against the appellants on September 10, 1954. The complaint alleged that the plaintiff was the Corporation Counsel of the City of New York and that § 22-a of the New York Code of Criminal Procedure empowered him to maintain an action for an injunction against any person who sells or distributes, or is about to sell or distribute, written or printed matter of an indecent character or which is obscene, lewd, lascivious, filthy, indecent or disgusting (R. 7).

Upon information and belief, each of the defendants was alleged to be a person, firm or corporation which sells, or is about to sell, or has in his possession with intent to sell, or distributes, or is about to distribute a publication entitled "Nights of Horror." All of the issues of such publication were alleged to be obscene, lewd, lascivious, filthy and disgusting and in violation of law. Issues 1-14 of "Nights of Horror" were annexed to the complaint as exhibits.* The relief requested was a judg-

* They were also admitted in evidence as Plaintiff's Exhibits 1-1M (R. 22-23); see also footnote to p. 6 *post*.

ment (1) enjoining the defendants from acquiring, distributing, or selling any issues of "Nights of Horror," and (2) directing the defendants to surrender to the Sheriff any issues of such publication within their control, and (3) directing the Sheriff to seize and destroy the same.

(2)

The defendants Kingsley Books, Inc., Martin Kleinberg, and Louis Finkelstein—the instant appellants—submitted an answer (R. 10-11) which, as subsequently amended at the trial (R. 17), admitted that they had in their possession for sale or distribution issues of "Nights of Horror."

The answer denied the allegations of the complaint that such issues were obscene, lewd, lascivious, filthy, indecent and disgusting (R. 10). As affirmative defenses the answer asserted that §22-a of the Code of Criminal Procedure is unconstitutional and that the Charter of the City of New York precludes the plaintiff from bringing the action. This latter defense was withdrawn on the trial by the defendants Kingsley Books, Inc. and Martin Kleinberg (R. 41). No point was made in this regard in appellants' brief to the New York Court of Appeals nor is it made here.

The Evidence

Francis X. Cain, a detective in the New York City Police Department, called as a witness for the plaintiff, testified that on August 23, 1954, he visited the premises occupied by defendant Kingsley Books, Inc., on the ground floor at 220 West 42nd Street in the City of New York. (R. 19). Volumes 1 to 16 of "Nights of Horror" were on display; between 10 and 25 copies of each volume were on hand, the copies of each volume being kept in a separate stack (R. 21).

Cain purchased copies of volumes 2, 5 and 7 of "Nights of Horror" and paid $6 for them to an unidentified person, who he subsequently learned was the defendant Martin Kleinberg (R. 21-22). On August 25, 1954, he returned to the premises and purchased copies of volumes 3 and 4, paying $4 for them. Martin Kleinberg was present on the second occasion but he was not the person to whom the money was paid (R. 22).

Volumes 1 to 14 of "Nights of Horror," which were identified by the witness as having been on display at the premises on both August 23 and 25, were received in evidence without objection (R. 22-23; Pltff's. Exhs. 1-1M, not printed*).

On September 10, 1954, Cain returned to the premises of Kingsley Books, Inc., accompanied by another police officer, and served upon Kingsley Books, Inc., the summons and complaint in the action, together with an order of Mr. Justice Edgar J. Nathan, Jr., of the New York Supreme Court, dated September 10, 1954, requiring the defendants in the action to show cause at a Special Term of the Supreme Court on September 14, 1954, why an order should not be made in the action enjoining the defendants *pendente lite* from sale and distribution of the publications referred to in the complaint.**

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* These exhibits, as well as the inventories hereinafter referred to (Pltff's Exhs. 2, 3, 4 and 5), were omitted from the Record on a stipulation (R. 43), which further provides that the Exhibits may be handed up to the Court upon argument of the appeal. It would appear from the Record (R. 28-30) that the volumes of "Nights of Horror" were printed by the Pilgrim Press, operated by one Eugene J. Maletta. He was not a party to the action.

** An order containing an injunction *pendente lite* was made on September 22, 1954 by Mr. Justice William C. Hecht of the New York Supreme Court "upon consent of the attorney appearing for the parties at that time" (R. 39). Although it was stipulated that this order and the order to show cause "be deemed a part of the record of this trial" (R. 39), neither paper is included in the Record before this Court.

The order to show cause contained provisions enjoining the defendants from sale and distribution of the publications pending the hearing and determination of the motion for an injunction *pendente lite* and directing that an inventory be taken of the copies of the publications in question in the possession and control of the defendants. Pursuant to the order to show cause, the witness did take such inventory, which listed approximately 2,650 copies of various volumes of "Nights of Horrow" (R. 24-25; Pltff's Exh. 2).

Detective Cain further testified that on August 17, 1954, he visited the premises occupied by the defendant Metropolitan Book Shop, Inc.,* on the ground floor of 1133 Sixth Avenue in the City of New York (R. 25-26). About five or six volumes of "Nights of Horror" were on sale. He purchased copies of volumes 9, 11 and 14 and paid $9.27 for them. On August 18, 1954, he went back to the same place and purchased copies of volumes 12 and 13 for $6.18 (R. 26-27). On September 10, 1954, he returned to the premises and, pursuant to the order to show cause, made an inventory of "Nights of Horror," listing 31 copies of various volumes (R. 27-28; Pltff's Exh. 3).

James Rushin, also a detective in the New York City Police Department, testified that on September 9, 1954, he visited the Times Square Book Shop, located at 225 West 42d Street in the City of New York. Sixteen different issues of "Nights of Horror" were on display, about 40 or 45 copies in all. He bought one copy for $2 (R. 31-32). On September 10, he returned and, pursuant to the order to show cause, took an inventory which listed 234 copies of "Nights of Horror" (R. 33; Pltf's Exh. 4).

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* This defendant is not a party to the instant appeal. See footnote to p. 1, *supra*.

James J. McCarthy, also a detective in the New York City Police Department, testified that on September 9, 1954, he went to the Pelley Book Shop on the street level at 790 Eighth Avenue in the City of New York. Volumes 1 to 12 of "Nights of Horror" were on display and he bought one for $4. While he was there, Philip Pellegrino, one of the defendants,* came in and identified himself as the owner of the shop (R. 34-35). On September 10, 1954, he returned to the shop and, pursuant to the order to show cause, made an inventory listing 16 copies of "Nights of Horror" (R. 35-36; Pltff's Exh. 5).

It was conceded that the Times Square section of the City of New York, in which are located all the book shops as to which the witnesses testified, is a high traffic area, attracting persons of all ages and visitors from out of town (R. 37-38).

Since the publications in question are plainly and undisputedly obscene, we see no reason to recite their contents. We respectfully refer the Court to the opinion of Mr. Justice Levy with respect to this aspect of the case (see Opinion, particularly at R. 53-54).

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* This defendant is not a party to the instant appeal. See footnote to p. 1, *supra*.

ARGUMENT

The constitutionality of § 22-a of the New York Code of Criminal Procedure should be upheld on this appeal since:

(a) The appellants do not question the definiteness of the statutory standard laid down by the statute in respect to obscene publications;

(b) The appellants concede that the books they sold and held for sale are in fact obscene;

(c) The statute does not involve a prior restraint on publication but only the infliction of penalties after publication, with appropriate procedural protection for those sued under it; and

(d) Even if there were some element of prior restraint, it is clear that such restraint is constitutionally permissible with respect to obscene publications.

(1)

The cases which have come before the Courts for review with respect to the constitutionality of legislative enactments dealing with matter offensive to public morality have in practically every instance dealt with either (1) the asserted vagueness and indefiniteness of the standard to be applied by the Court or administrative agency charged with enforcement, or (2) the question of whether the offending matter fell within one of the categories proscribed by the statute.

The instant case poses neither of these issues. Judge Fuld in his opinion below refers (R. 80) to the appellants as "not questioning the definiteness of the statutory standard, [and] not challenging the test of obscenity applied by the trial judge"; and, after stating (*ibid.*) that "The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy," continues

with the comment that the "Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the [New York] Penal Law [§ 1141], no constitutional argument could successfully have been leveled against resulting convictions." Judge DESMOND, in the other opinion handed down by the Court of Appeals, states (R. 90) that the "Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been enjoined, are obscene."

If the question of the definiteness of the statutory standard were open to the appellants in this Court, it is clear that an attack on the statute on that ground would, in any event, be without merit. The standard set up by § 22-a—"obscene, lewd, lascivious, filthy, indecedent or disgusting"—is a valid and adequate one. See the numerous cases cited by Judge DESMOND in support of this proposition (Opinion, R. 91); particularly *Winters* v. *New York*, 333 U. S. 507 (1948), where this Court indicated (at p. 518) that this very language is sufficiently "well understood from long use in the criminal law" to satisfy the due process requirements of definiteness and certainty, and actually (at p. 520) pointed to a legislative provision containing this language as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications." In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), this Court again (at p. 80) referred to these same words as "examples of permissible standards of statutes for criminal prosecution." See, also, *One, Inc.* v. *Olesen*, —— F. 2d —— (9th Cir., decided Feb. 27, 1957). And on the related question of obscenity as a permissible ground for censorship of motion pictures, see *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585 (1954), *app. dism. for want of a final judgment* 348 U. S. 979 (1955), *s. c. on appeal after remand* —— Ill. App. 2d —— (App. Ct., 1st Dist., decided March 18, 1957).

(2)

Judge FULD notes in his opinion (R. 80-81) that the appellants' "sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional 'prior restraint,' interfering with freedom of speech and press." Judge DESMOND, likewise, states (Opinion, R. 90) of the appellants that "Their sole assertion in this court is that section 22-a is unconstitutional because * * * any and every prior restraint on the publication or sale of obscene literature violates the First Amendment."* And the appellants' brief in this Court (p. 4) similarly limits their challenge of the statute to a claim that it violates due process "in that it is a prior restraint upon publications."

Taking up this sole contention of the appellants, we note initially that, as Judge FULD points out (Opinion, R. 83), "no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the [New York] Penal Law." And, as Judge DESMOND remarks (Opinion, R. 91), "No one claims that section 22-a lacks appropriate procedural protections for those sued under it."

Judge FULD in his opinion subjects the statute to a careful analysis and concludes (R. 86):

> "There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the

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* The provision of the statute (subd. 2) directing the Court to render its decision "within two days of the conclusion of the trial" is not before the Court since the parties agreed (R. 40) neither to invoke nor insist upon that requirement. See also opinion of Judge FULD (R. 81, n. 2).

> contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well on as the law (Civ. Prac. Act, §584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling (see Emerson, *supra* [The Doctrine of Prior Restraint], 20 Law and Contemporary Problems, at pp. 656-660)."

The contention of counsel for appellants that the statute here under review, despite the considerations noted by Judge FULD, does nonetheless constitute the imposition of a prior restraint, is, we believe, based upon a misinterpretation of the relevant decisions of this Court. Particularly is this true of *Near* v. *Minnesota*, 283 U. S. 697 (1931), which counsel for appellants, throughout his brief (see pp. 10-11, 13-16, 28-29) attempts to liken to the instant case. Actually the two cases present fundamentally different problems.

Basic to determination of the instant case on the issue of prior restraint is the fact that the Court below explicitly *refused* to enjoin the sale and distribution of *future* volumes of "Nights of Horror" on the stated ground (R. 67, 69-70) that (R. 70) "there can be no injunction regarding an unpublished book or pamphlet—however likely it may be thought that it will, when issued, be violative of the statute." In *Near* v. *Minnesota*, *supra* [283

U. S. 697], on the other hand, the very crux of the case was the fact that the statute authorized—and the State court issued—an injunction against *future* publication of the periodical there involved, upon a finding (see at p. 706) that past issues showed that it was "a malicious, scandalous and defamatory newspaper."

Counsel for appellants in the case at bar makes much of the circumstance that the injunction in the *Near* case applied as well to those issues already published, and upon which the finding of a "public nuisance" was based, as to future issues. The opinion in the *Near* case shows, however, that this Court was plainly concerned with the enjoining of future publication (see at pp. 713-715), not the suppression of issues published prior to the issuance of the injunction.

The reason is quite apparent. In *Near*, the appellant in this Court was (see p. 705) the publisher of the weekly periodical there involved, known as The Saturday Press. The prior issues of this periodical were, of course, distributed, on issuance, to subscribers and newspaper vendors. An injunction directed *against the publisher and printer* of the periodical with respect to the prior issues would, accordingly, have so little impact that its validity in that regard would be of no concern either to the parties or to the Court.

In the case at hand, however, the publication in question is not a periodical and the defendants before the Court are not the publishers and printers of the volumes, but the persons and firms holding and offering the published copies for sale to the public. The order providing for seizure and destruction of the copies of "Nights of Horror" in possession of these vendors obviously presents a different problem from the tangential provision of the order in the *Near* case, which, to repeat, was aimed at the suppression of *future* issues.

The *Near* case deserves consideration for another, though related, reason. Counsel for appellants asserts that "The present case is identical with *Near* from the issuance of a temporary injunction to final injunction" (Brief, p. 11; see also at pp. 28-29). The two cases are in fact as dissimilar in regard to the temporary injunction as we have shown them to be with respect to the final injunction. In *Near*, as Chief Justice HUGHES noted (283 U. S., at p. 703), the very statute whose constitutionality was challenged provided that "Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted." The temporary injunction so authorized would enjoin a defendant *pendente lite* from proceeding with the publication and distribution of *future* issues of the periodical involved in the suit. It would, therefore, run afoul of the same constitutional shoals as the later granted permanent injunction

In the case at bar, the statute involved makes no provision at all for a temporary injunction. Such injunction may be sought and granted only, as appellants' counsel recognizes (Brief, p. 29), under a general statute (New York Civil Practice Act, § 877, set forth *post*, p. 22), authorizing the Court in its discretion to enjoin *pendente lite* the commission of acts against which a complaint is directed. See *Hammer* v. *Hammer*, 303 N. Y. 481, 484 (1952).

We do not understand the appellants to contest the validity of this statute. They are, indeed, hardly in a position to attack the injunction *pendente lite* in the instant case on any score since the record shows (R. 39) that it issued "upon consent of the attorney appearing for the parties at that time."

The cases other than *Near* relied on by appellants in respect to prior restraint on publication are likewise not in point. In *Lovell* v. *Griffin*, 303 U. S. 444 (1937), the city ordinance prohibited the distribution of circulars or

literature of any kind within the city limits without first obtaining written permission from the City Manager. The ordinance was held to be (p. 451) "invalid on its face" since it required a license prior to exercise of the right to distribute the religious tracts involved in the case.

The case at bar would be analogous to the *Lovell* case, *supra*, if we were here concerned with a statute which required book sellers to procure a license from a city official before engaging in that occupation. The statute now before the Court imposes no requirement of license or permit, and the *Lovell* case is, therefore, not apposite. It may be observed incidentally that Chief Justice *Hughes* in the course of his opinion in the *Lovell* case (see 303 U. S., at p. 451) intimated that the result might have been different had the ordinance been limited to writings that were "obscene or offensive to public morals".

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), also relied on by appellants (Brief, pp. 20-23), this Court held that a State may not require the procuring of a certificate from a designated official as a condition to soliciting support for a religious cause. It held further (pp. 305-306) that it was no answer for the State to say that the defendants might have recourse to Court action to enforce their right to the required certificate. The State could not, in other words, compel a person to seek a judicial mandate before exercising his constitutional right to distribute religious publications or other writings within the constitutional protection.

In the case at bar there is neither administrative nor judicial prior restraint upon the constitutional right. There is here no requirement of license, permit or certificate. What we do have is unrestrained publication, distribution to book sellers and proof of sale by them of the challenged writings. It is clear, therefore, that the subsequent judicial proceedings and injunction order are no more than a sanction additional to that prescribed by the criminal law for *past* activity.

Since, as Judge FULD points out (Opinion, R. 80), the defendants "acknowledge in effect, that, had they been criminally prosecuted for violating obscenity provisions of the Penal Law, no constitutional argument could successfully have been leveled against resulting convictions", we find it difficult to follow the reasoning of appellants' counsel. Surely a State has the right to restrain the further commission of acts judicially determined to be of a criminal character and injurious to the public welfare. See *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31, 40 (1890); cf. *Lawton* v. *Steele*, 152 U. S. 133, 136 (1894).

Other cases cited by appellants (Brief, pp. 23-24) require little comment. In *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147 (1939), and in *Largent* v. *Texas*, 318 U. S. 418 (1943), this Court struck down municipal ordinances which either flatly prohibited the distribution of literature on the public streets or required a permit as a condition to such distribution. And in *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), and *Kunz* v. *New York*, 340 U. S. 290 (1951), the Court reached the same conclusion with respect to similar ordinances relating to the right to speak in a public park or street. All these cases plainly fell within the scope of the holding of this Court in *Lovell* v. *Griffin*, *supra* [303 U. S. 444], which we have already discussed. The *Lovell* case was applied, too, in *Saia* v. *New York*, 334 U. S. 558 (1948), dealing with a city ordinance forbidding the use of sound amplification devices in public places except with the permission of the Chief of Police.

In *Kovacs* v. *Cooper*, *supra* [336 U. S. 77], this Court upheld a city ordinance forbidding use or operation on the public streets of a sound truck which emits "loud and raucous noises," which the Court viewed (pp. 83, 87) as merely regulating and not prohibiting the exercise of freedom of speech. The Court said (p. 83) that "disturb-

ing noises" were "nuisances well within the municipality's power to control" and continued with these words which, we believe, are equally applicable to the case at bar (p. 83):

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. *A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.*" (Italics ours.)

What is "reasonably thought to bring evil or harm to its people" is a matter peculiarly within the province of the State's legislative body. As Judge FULD points out (Opinion, R. 82-83), the New York Legislature apparently concluded that the criminal sanctions imposed upon the sale of obscene material "were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised. (Cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, N. Y. Legis. Doc., 1954, No. 37, pp. 31-32.)" It is significant, too, as also noted by Judge FULD (Opinion, R. 82), that statutes similar to New York Penal Law, § 1141, "are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chicago L. Rev. 216)."

(3)

We submit, finally, that, even were there an element of prior restraint in the case, there would still be no basis for an attack on the constitutionality of the statute. There is, as Judge DESMOND points out (Opinion, R. 90-91), "most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.* v. *Wilson*,

343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146)." To which we might add the words of this Court in *Lawton* v. *Steele, supra* [152 U. S. 133], (at pp. 136-137):

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded a public nuisance. Under this power it has been held that *the State may order* * * * *the suppression of obscene publications* and houses of ill fame * * *. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (Italics ours.)

Certainly Congress has indicated in the Federal field that it has no qualms with respect to "prior restraint" of obscene publications. Thus, as noted by Judge FULD (Opinion, R. 88-89), the Federal Tariff Act (46 Stat. 688 [1930], 19 U.S.C. § 1305) provides for the seizure by the Customs Collector of any obscene matter imported into this country and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter upon adjudication after trial that it is obscene. These provisions have uniformly been held or assumed to be constitutional. See *Besig* v. *United States*, 208 F. 2d 142 (9th Cir., 1953); *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir., 1940); *United States* v. *One Book Called Ulysses*, 72 F. 2d 705 (2d Cir., 1934); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (D. C., S.D.N.Y., 1931); *United States* v. *One Unbound Volume of Prints*, 128 F. Supp. 280 (D. C., Md., 1955).

Similarly, Congress has provided that obscene publications are unmailable (35 Stat. 1429 [1909] as amended, 18 U.S.C. § 1461]; and that they may not be deposited with any express company or other common carrier for transportation in interstate or foreign commerce (35 Stat. 1138 [1909] as amended, 18 U.S.C. § 1462. This Court has said of these statutes that their validity "is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." *Hannegan* v. *Esquire, Inc., supra* [327 U. S. 146], at p. 158. And see *Summerfield* v. *Sunshine Book Company,* 221 F. 2d 42 (D. C. Cir., 1955), *cert. den.* 349 U. S. 921 (1955); *Sunshine Book Co.* v. *Summerfield,* 128 F. Supp. 564 (D.C., D.C., 1955) [appeal pending].

CONCLUSION

The judgment appealed from should be affirmed.

April 3, 1957.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel
of the City of New York,
Attorney for Appellee.

SEYMOUR B. QUEL,
FRED ISCOL,
of Counsel.

APPENDIX

Section 22-a of the New York Code of Criminal Procedure

Section 22-a of the New York Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§ 22-a. **Obscene prints and articles; jurisdiction.**

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

Cited Provisions of the New York Civil Practice Act

"§ 588. **Appeal as of right.** Appeal to the court of appeals lies only

* * * * *

4. from a judgment of a court of record of original jurisdiction which finally determines an action, or an order of such court which finally determines a special proceeding, where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

"§ 877. **Injunction, when the right thereto depends upon the nature of the action.**

Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action."

Office - Supreme Court, U.S
FILED
FEB 23 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., MARTIN KLEINBERG and LOUIS FINKELSTEIN, doing business as Times Square Book Shop,

and

METROPOLITAN BOOK SHOP, INC., ANNE GOLDBERG, PHILIP PELEGRINO, doing business as Pelley Book Shop, Publishers Outlet and Gordon Law,

Appellants,

against

PETER CAMPBELL BROWN, as Corporation Counsel of the City of New York,

Appellee.

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND TO ARGUE ORALLY.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York

JAMES O. MOORE, JR.
Solicitor General of the State of New York

RUTH KESSLER TOCH
Assistant Attorney General

Of Counsel

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MOTION OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND TO ARGUE ORALLY.

May It Please The Court:

The undersigned, as Attorney General of the State of New York, respectfully moves this Honorable Court for leave to file a brief in behalf of the position of the appellee in the above cause and to argue orally for a period of about twenty minutes in support thereof.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
The Capitol
Albany 1, New York

PRELIMINARY STATEMENT.

Under a provision of the statute of New York State which sets forth the duties of the Attorney General of the State, there is placed upon the Attorney General the duty of appearing in support of the constitutionality of a statute of the State, when its constitutionality is brought into question in a litigation (New York Executive Law, § 71).

In practice, the Attorney General of New York State exercises his discretion as to when it is indicated that he should participate in a litigation in which the constitutionality of a statute is attacked, and at what stage of the litigation he should appear.

In this litigation, in which the constitutionality of a statute of the State, designed to control the dissemination of obscene literature, has been challenged, it is the judgment of the Attorney General that the time has come for him to discharge his statutory responsibility in this Court, where the definitive ruling as to the constitutionality of the statute is to be made. This Court noted jurisdiction in the case on January 14, 1957.

ARGUMENT.

POINT I.

Possible significance of determination in this cause upon other New York statutes, and resultant reason for Attorney General to participate in the appeal in this Court.

Within the last three years particularly, a Joint Legislative Committee composed of members of both houses of the State Legislature of New York State, after extensive investigation and study, and finding a widespread and acute

evil in the dissemination in the State, especially among young people, of obscene publications, pictures and other materials, has offered a series of proposed laws designed to stem the distribution and sale of such materials. A number of such bills have become law by adoption by the State Legislature and approval by the Governor. They are listed in an Appendix to this Motion.

One of these laws was the one which, by amendment in 1954 pursuant to recommendation of the Joint Legislative Committee, gave to the Corporation Counsel of the City of New York the legal machinery he employed (New York Code of Criminal Procedure, § 22-a) in the cause before the Court here, to enjoin the sale of written or printed matter found, after trial, to be obscene. (Prior to 1954, this law did not contain the provision permitting a municipality's legal officer to take action thereunder.)

The constitutional attack upon the statute by appellants in the Courts of New York State was based upon the contention that the remedy provided in this statute constituted prior restraint interfering with freedom of speech and the press. The Courts of the State have held that argument to be without merit and the statute to be constitutional and valid (*Brown* v. *Kingsley Books, et al.*, 1 N. Y. 2d 177, affirming, 208 N. Y. Misc. 150 [*sub nom. Burke* v. *Kingsley Books Inc., et al.*]).

While, of course, the particular statute involved in this case would be the only one discussed by the Attorney General orally and in the brief filed by him, his responsibility as to constitutionality of the entire body of New York State laws on the subject is urged as reason that he be heard in the cause, in addition to the Corporation Counsel of New York City whose legal duty in respect to the statute

would not be in the frame of reference to the body of statute laws on the subject as is the Attorney General's. This Court noted jurisdiction in the present case simultaneously (January 14, 1957) with noting jurisdiction in No. 61, *Alberts* v. *California*, and granting certiorari in No. 582, *Roth* v. *United States*, and ordered that the three cases be consolidated for argument. In view of the fact that the Court thus desires to hear these cases, not each in isolation but in relation to each other and to the several statutory provisions involved in them, there is particular reason why the Attorney General of New York State, where a number of statutes on the same subject are in effect in addition to the statute involved in the case, also be heard.

The motion of the Attorney General of the State of New York to file a brief *Amicus Curiae* and argue orally in this appeal should be granted.

Dated: February 14, 1957.

Respectfully submitted,

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APPENDIX

Statutes Enacted in New York State in 1954-1956 Dealing With Distribution of Obscene Literature and Articles.

[The description herein of the provisions of the several statutes refers only to their basic provision and omits details. The word "obscene" alone is used here in connection with the statutes. The statutes themselves contain additional terms describing the literature and materials to which they are made applicable]

L. 1954, c. 704—adding Section 1141-b to New York Penal Law. Prohibits "tie-in" sales compelling merchants to handle obscene literature.

L. 1954, c. 702—amending New York Code of Criminal Procedure, § 22-a. This is the section upon which the case at bar is based. The amendment, among other provisions, authorizes the chief legal officer of any city, town or village, to bring actions to enjoin the sale of literature and other articles, found after trial to be obscene.

L. 1955, c. 836—adding Article 49 to New York Penal Law. Makes it a misdemeanor to publish or distribute for resale publications, the title or titles of which contain the words crime, sex, horror or terror.

L. 1955, c. 837—adding to New York Penal Law § 1141(3). Makes possession of six or more identical articles, whose sale is prohibited by Section 1141 of the Penal Law, presumptive evidence of violation of the section.

L. 1956, c. 423—amending New York Penal Law 1141(3). Makes possession of six or more similar articles, whose sale is prohibited by Section 1141 of the Penal Law, presumptive evidence of violation of the section.

L. 1956, c. 598—adding to New York Penal Law § 1141-c. Authorizes seizure by a peace officer of the State, of equipment used in photographing or producing, in the manner described in the section, pornographic, still or motion pictures, and vehicles other than common carriers used in the distribution of obscene articles, and forfeiture thereof.

L. 1956, c. 661—amending New York Penal Law § 1141(1). Adds motion picture projectors to Penal Law prohibition against possession of mechanical contrivances with obscene motion pictures.

L. 1956, c. 662—amending New York Penal Law § 1141(2). Increases the penalties for employing any minor to assist in violating the provisions of Section 1141 prohibiting the distribution of obscene articles.

L. 1956, c. 681—amending New York Penal Law § 1141(1). Makes sale of sadistic and masochistic publications a misdemeanor.

L. 1956, c. 685—amending New York Penal Law § 1144. Permits the District Attorney to deliver seized obscene articles to the F.B.I., State Police or State or Federal investigative committees for investigation, laboratory examination or classification.

L. 1956, c. 599—amending New York Penal Law § 1143. Makes it misdemeanor to mail or transport any advertising material dealing with obscene articles.

L. 1956, c. 886—adding to New York Penal Law § 436-d. Makes it a misdemeanor to sell any publication, other than a rare book, manuscript or educational text, from which the cover or title page or other identification mark has been removed or obliterated.

L. 1956, c. 945—amending New York General Business Law §§ 330, 331. Requires every publication printed or reprinted after September 1, 1956, to have imprinted at one of the places thereof designated in the statute, the name and address of the publisher or printer. (Prior to the 1956 amendment, the statute had, for fifty years, required this information to be printed only in newspapers, magazines and periodicals.)

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IN THE

Supreme Court of the United States

KINGSLEY BOOKS, INC., MARTIN KLEINBERG and LOUIS FINKELSTEIN, doing business as Times Square Book Shop,

and

METROPOLITAN BOOK SHOP, INC., ANNE GOLDBERG, PHILIP PELEGRINO, doing business as Pelley Book Shop, Publishers Outlet and Gordon Law,

Appellants.

against

PETER CAMPBELL BROWN, as Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, BY INVITATION OF THE COURT, IN SUPPORT OF CONSTITUTIONALITY OF NEW YORK CODE OF CRIMINAL PROCEDURE, SECTION 22-a

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Attorney General of the State of New York

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Solicitor General

RUTH KESSLER TOCH
Assistant Attorney General

Of Counsel

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1954 N. Y. Legis. Doc. No. 37, p. 9 5

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BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, BY INVITATION OF THE COURT, IN SUPPORT OF CONSTITUTIONALITY OF NEW YORK CODE OF CRIMINAL PROCEDURE, SECTION 22-a

Statement

This brief is filed by the Attorney General of the State of New York, in support of the constitutionality of Section 22-a of the Code of Criminal Procedure of New York, which is an issue on this appeal.

This Court invited the Attorney General of New York, by order entered March 25, 1957, to file a brief, as *amicus*

curiae. Such order was entered in a motion made by the Attorney General to appear and present oral argument and file a brief *amicus curiae*. The motion to appear and present oral argument was denied. In a letter dated March 26, 1957, Honorable J. T. Fey, Clerk of this Court, by Honorable E. P. Cullinan, Deputy, wrote to the Attorney General that "The Court would like to have presented a full discussion of the legislative history of the statute in issue as well as any memoranda that may have been submitted by the Governor of New York pertaining to this legislation."

Facts

The action for injunction brought against appellants here, by the Corporation Counsel of the City of New York, pursuant to Section 22-a of the Code of Criminal Procedure of New York, involved published booklets offered for sale entitled "Nights of Horror". After trial by a Justice of the Supreme Court of the State, the injunction was granted as to such booklets already published and offered for sale. The Trial Court construed the statute as not permitting injunction of future publications of the booklets or of pamphlets in a series to be published in the future, and the Court of Appeals agreed with this construction (R. pp. 67, 88; 208 Misc. at pp. 168-9; 1 N. Y. 2d at p. 187).

Appellee's brief sets forth the facts in the case and the proceedings had therein in detail at pages 1-3, 4-8. In the interest of limiting the length of this brief, such details will not be repeated here. The nature of these booklets is graphically described in the opinion of the Trial Judge (R. pp. 51-4; 208 Misc. 157-9, 160) and is referred to in the opinion of Judge Fuld in the Court of Appeals (R. p. 80; 1 N. Y. 2d 180). Appellants have not disputed that. They have indeed indicated that they assume they

could be prosecuted criminally for the sale of these booklets, under the obscenity provisions of the Penal Law.

Jurisdiction

Jurisdiction was noted in the instant case on January 14, 1957.

The Statute Involved

Section 22-a of the Code of Criminal Procedure of the State of New York.

The statute involved is Section 22-a of the Code of Criminal Procedure of New York, which authorizes the chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town or village, to bring an action for an injunction to prevent the sale or distribution of "any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character which is obscene, lewd, lascivious, filthy, indecent or disgusting".

Subdivision 2 of the section provides that the person sought to be enjoined "shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the Court within two days of the conclusion of the trial."

The text of the section is set out in full as Appendix I to this Brief.

The Penal Law of the State, Section 1141 thereof, makes it a misdemeanor to sell or distribute the items which are the subject of Section 22-a (R. p. 79; 1 N. Y. 2d 179).

Section 22-a of the Code of Criminal Procedure as First Enacted in 1941.

The statute was originally enacted in 1941 (L. 1941, c. 925).

As originally enacted it differed from its present form in that only the chief executive officer of a city, town or village was authorized to maintain the action for injunction. As originally enacted it also contained a provision which was deleted in 1954 after the decision of this Court in *Winters* v. *New York*, 333 U. S. 507. (The portion deleted in 1954 had included in the publications which could be enjoined, any which are "principally made up of criminal news, police reports or accounts of criminal deeds, or pictures, or stories of deeds, of bloodshed, lust or crime.")

There is no legislative record available relative to the enactment of Section 22-a in 1941.

Nor does there appear to have been a memorandum by the Governor when he approved the bill.

Legislative History of Section 22-a of the Code of Criminal Procedure of New York in its present form, as amended in 1954.

In 1949 a Joint Legislative Committee to Study the Publication of Comics was created by the Legislature of the State of New York. The name of the Committee was changed in 1955 to "Joint Legislative Committee Studying the Dissemination of Objectionable and Obscene Materials".

The Committee consists of members of the two legislative bodies of the State, the Senate and the Assembly.

The appearance in great numbers in recent years of so-called comic books which are in no way related to

comedy, but are devoted to obscenity, pornography, lewdness, lasciviousness, indecency and filth, prompted the Legislature to create a Legislative Committee to make a survey of the problem which it deemed to be acute, and to find some way of dealing with it. The resolution creating the Committee declared in part that its function was to recommend to the Legislature "such appropriate remedial legislation as may be found necessary or desirable, without in any way restraining or breaching the liberty of the press." (1954 N. Y. Legis. Doc. #60, p. 25).

The Committee held public hearings in 1950 and 1951 at which experts on the subject, including psychiatrists, children's court judges, county judges, district attorneys, probation officers, cartoonists, publishers and newspaper editors, testified (1954 N. Y. Legis. Doc. No. 37, p. 9).

The 1954 Report of the Committee noted the failure of the comic book industry to cleanse itself and accordingly recommended the enactment of several remedial statutes, three of which became law in that year. One of these statutes, increases the minimum fine provided in Section 1141, subdivision 2 of the New York Penal Law for the crime of hiring any minor or child to assist in the sale or distribution of obscene articles prohibited by that statute (L. 1954, c. 703).

Another bill recommended by the Committee, and enacted in 1954, prohibits "tie-in" sales which compel the purchaser of books, magazines or periodicals to receive for resale articles, books, or other publications which he reasonably believes to be "obscene, lewd, lascivious, filthy, indecent or disgusting" (L. 1954, c. 702).

The third law enacted that year is the amendment to the law involved in this appeal, Section 22-a of the Code of Criminal Procedure, to bring it to its present form.

The Governor on April 15, 1954 approved the three bills in a single memorandum, which is here set out in full (L. 1954, c. 704):

STATE OF NEW YORK

EXECUTIVE CHAMBER

ALBANY

April 15, 1954

MEMORANDUM filed with the following bills:

Assembly Bill, Introductory Number 2839, Print Number 2963, entitled:

"AN ACT to amend the code of criminal procedure, in relation to the publication of obscene literature"

Assembly Bill, Introductory Number 2719, Print Number 2843, entitled:

"AN ACT to amend the penal law, in relation to increasing fine on conviction of persons guilty of distributing obscene prints and articles"

Assembly Bill, Introductory Number 2753, Print Number 2877, entitled:

"AN ACT to amend the penal law, in relation to distribution of indecent articles"

APPROVED

These three bills, sponsored by the Joint Legislative Committee to Study the Publication of Comics, are designed to strengthen the penal statutes relating to the sale and distribution of obscene publications.

The first bill extends the power to bring proceedings to enjoin the sale or distribution of obscene literature—specifically including comic books—to the corporation counsel or chief legal officer of a city, town or village. The statute is also strengthened by eliminating provisions of doubtful constitutionality.

The second bill increases the minimum fine for the sale or distribution of obscene literature from $50 to $150.

The third bill is aimed at the practice of tie-in sales which compel the dealer to accept objectionable magazines and books in order to obtain standard publications of unquestioned propriety. The bill makes clear that a dealer cannot be compelled to accept any publication which he reasonably believes to be obscene or indecent. The economic coercion involved in the tie-in sale is particularly repellent when used for the promotion or exploitation of obscene materials.

In its most recent report the Joint Legislative Committee states:

> "In instance after instance, this Committee, and the groups involved, have been met with the protests of retailers to the effect that any large-scale refusal on their part to accept from the distributors or publishers the consignments of objectionable literature, would result either in the complete loss of franchise, or in the withholding of certain legitimate publications from the dealer involved. Ample evidence has been presented to substantiate the reality of this practice." (Report of the New York State Committee to Study the Publication of Comics (1954) pp. 32, 33)

The bills are approved.

(Signed) THOMAS E. DEWEY

Since 1954 other statutes recommended by the Joint Legislative Committee have been enacted directed to coping with the problem of obscene publications. These are set forth in Appendix II to this brief.

The Holding in this Case by the Trial Court and the Court of Appeals.

The opinion of the Trial Court appears at pp. 44-74 of the Record, and is reported in 208 N. Y. Misc. Rep. 150.

The opinions of the Court of Appeals appear at pp. 79-91 of the Record and are reported in 1 N. Y. 2d 177.

Both opinions, one by Judge Fuld, (in which Judges Dye and Van Voorhis concur), and another by Judge Desmond in which Chief Judge Conway and Judge Froessel concur, reach the same conclusion by different reasoning.

The Trial Court held:

1. The booklets, illustrated by drawings, "are obscene and constitute pornography — 'dirt for dirt's sake'" (R. p. 55; 208 Misc. at p. 160). The contents of the booklets are described in the opinion (R. pp. 51-4; 208 Misc. at pp. 157-160).
2. Under the principle voiced by this Court, in a number of cases, enjoining the sale of "Nights of Horror", which is "totally lacking in merit" and "so obviously pornographic in intent", "poses no threat to freedom of expression in literature or otherwise" (R. pp. 57-8; 208 Misc. 161).
3. The punishment of the sellers of obscene publications under Penal Law § 1141 was found by the New York State Joint Legislative Committee not to meet the problem they present, for the purveyors are willing to accept occasional convictions and prison sentences in return for the profit that there appears to be in this business. Accordingly the Joint Legislative Committee deemed the action for injunction necessary. The Court on the evidence before it could not say that the Legislature's

conclusion was without basis or was erroneous (R. pp. 60-1; 208 Misc. 162-3).

4. There is no "prior restraint" in this statutory provision, since it provides "adequate notice, judicial hearing", "an adversary hearing", "an opportunity for the Court to read and examine the publications objected to" (R. pp. 62-3; 208 Misc. 164).
5. Construed § 22-a as authorizing injunction of sale or distribution, only of books already published, and not of later or not yet published issues (R. pp. 67-8; 208 Misc. at pp. 167-8).
6. This Court has declared, in *Near* v. *Minnesota*, 283 U. S. 697, 702, that there is a limitation on and there are exceptions to the constitutional protection against prior restraint, saying:

   "the primary requirements of decency may be enforced against obscene publications * * *. The security of the community may be protected against incitements to acts of violence". This statute comes within that holding in the *Near* case (R. p. 64; 208 Misc. at p. 165).

The Court of Appeals held:

1. Construed the "limited injunctive remedy" provided in § 22-a as "not [to] be condemned as a forbidden prior restraint" (Op. of Judge Fuld, R. p. 88; 1 N. Y. 2d at p. 187).
2. Construed § 22-a as containing "nothing" that constitutes or resembles a system of "threshold" approval, or scrutiny prior to publication. It may be invoked "only after publication". There must be "formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law". The Trial Judge's

findings are subject to appellate review on the facts as well as on the law. "Examination of the operation and effect of § 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law". (Op. of Judge Fuld, R. pp. 86-7; 1 N. Y. 2d pp. 185-6; see also Op. of Judge Desmond, R. p. 91; 1 Y. 2d at p. 190: "No one claims that section 22-a lacks appropriate procedural protections for those sued under it").

3. Construed § 22-a as not permitting injunction against sale or distribution of any future work in the same series (Op. of Judge Fuld, R. p. 88; 1 N. Y. 2d at p. 187).

4. Distinguished the statute involved in *Near* v. *Minnesota*, 283 U. S. 697, noting particularly (a) that the *Near* case involved polities whereas § 22-a deals with "erotics", and "Nights of Horror" are "unredeemed by even an iota of idea content or of artistic worth"; (b) § 22-a (unlike the Minnesota statute) imposes "no restraint of any kind on the publication or distribution of material to be written or produced in the future" (Op. of Judge Fuld, R. p. 88; 1 N. Y. 2d at pp. 186-7).

5. Defendants (Appellants here) admit that the books "Nights of Horror" are obscene (Op. of Judge Fuld, R. p. 80; 1 N. Y. 2d at p. 180; Op. of Judge Desmond, R. p. 90; 1 N. Y. 2d at p. 189).

6. The books "are indisputably pornographic, indisputable, obscene and filthy" (Op. of Judge Fuld, R. p. 80; 1 N. Y. 2d at p. 180). The "obvious" fact is that the books are "obscene" (Op. of Judge Desmond, R. p. 80; 1 N. Y. 2d at p. 189).

7. The standard set up by § 22-a, "obscene, lewd, lascivious, indecent or disgusting" is a valid and definite one, declared in *Winters* v. *New York*, 333 U. S. 507 at pp. 518-520, to be "well understood through long use in the criminal law" and "apt words" "to describe the prohibited publications" (Op. of Judge Fuld, R. p. 82; 1 N. Y. 2d at p. 182; Op. of Judge Desmond, R. p. 91; 1 N. Y. 2d at p. 189).
8. The First Amendment does not protect obscene publications against prior restraint, citing decisions by this Court (Op. of Judge Desmond, R. pp. 90-1; 1 N. Y. 2d at p. 189; see also Op. of Judge Fuld, R. pp. 83-4, 89-90; 1 N. Y. 2d at pp. 183-184, 188).

Summary of Argument

I. Section 22-a of the Code of Criminal Procedure of New York, as construed by the highest court of New York, does not constitute prior restraint of publications.

II. This Court has declared many times that obscene, lewd or indecent publications are subject to control.

Argument

I

Section 22-a of the Code of Criminal Procedure of New York, as construed by the highest court of New York, does not constitute prior restraint of publications.

The highest court of New York, affirming the Trial Court, construed Section 22-a of the Code of Criminal

Procedure as authorizing an injunction only of obscene books already published. Injunction was denied as not permitted by the statute, as to future booklets in the series, before publication. (Op. of Judge Fuld, R. p. 88; 1 N. Y. 2d p. 187)

There can, then, under this statute, be no question of restraint prior to publication.

As construed by the highest court of New York, Section 22-a, and the injunction which may be granted thereunder, is thus differentiated from the Minnesota statute involved in *Near* v. *Minnesota*, 283 U. S. 697, upon which appellants base their case, and from the injunction held permissible under the Minnesota statute. It was, as Judge Fuld said, "this feature of the law" "that was regarded by the Supreme Court as of the essence of censorship and an unwarranted infringement on freedom of discussion". (R. p. 88; 1 N. Y. 2d at p. 187) See pp. 703, 705 and 710 of the *Near* opinion, 283 U. S.

Nor is there any characteristic of prior restraint in Section 22-a in the sense of a requirement of prior approval of any publication. Judge Fuld pointed out (R. p. 83; 1 N. Y. 2d at p. 182) that "no injunction may issue under Section 22-a except after a full trial of the issues". It may issue "only upon a finding that the challenged publication is of the same character and would subject the defendant to punishment under the pertinent provisions of the Penal Law". "What the statute does is to provide an additional sanction against the dissemination of obscene material".

As Judge Fuld's opinion further pointed out (R. p. 86; 1 N. Y. 2d at pp. 185-6) "there is nothing in Section 22-a that constitutes or resembles a system of licensing or other threshold approval * * * On the contrary, the statute makes no attempt to subject writings to the scrutiny and screening

of a censor prior to publication". He stressed that under § 22-a "the statutory procedures may be invoked only after publication"; that "no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law"; "the mind of the Trial Judge must be satisfied, from a reading of the challenged writing and a consideration of the other pertinent evidence, that it is indeed, of the type and character condemned by the statute". He called attention to the fact that the Trial Judge's findings are subject to appellate review "on the facts as well as on the law". He contrasted this procedure with the procedure when there is a censoring official, in whom a large measure of discretion is reposed and where the procedural safeguards of judicial review are not available, and with the Minnesota statute upon which the *Near* case turned, where no element of the procedure of § 22-a was provided.

II

This Court has declared many times that obscene, lewd or indecent publications are subject to control.

Appellant (Br. p. 4) states that the "sole" issue in this case is whether Section 22-a constitutes prior restraint upon publications protected by the constitutional guarantee of freedom of speech and the press.

Section 22-a has been construed by the highest Court of New York as not constituting a prior restraint (point 1, *supra*). Construction of a State statute by the highest Court of the State is treated as authoritative by this Court. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572) Moreover the grounds which the New York Court of Appeals has cited for its construction are unquestionably eminently sound.

We submit that the conclusion that Section 22-a does not constitute prior restraint is the end of this case.

However, appellant has devoted much of his brief to arguing for freedom to publish the obscene. That "Nights of Horror" are booklets of unmitigated obscenity as a whole and of no literary merit or pretended literary value, appellant does not dispute and the Courts of New York have so found. (Op. of Judge Fuld, R. p. 80; 1 N. Y. 2d p. 180; Op. of Judge Desmond, R. p. 90; 1 N. Y. 2d p. 189)

That the language of the statute here is sufficiently definite and presents no question as to vagueness or uncertainty, again appellant does not dispute. Indeed this very language has had the stamp of approval of this Court. (*Winters* v. *New York*, 333 U. S. 507, 518, 520)

We come then to the expressions by this Court going back over the years and brought forward to the present day, to the effect that obscenity is subject to control, notwithstanding the guarantee of freedom of speech and of the press contained in the First Amendment. Some of these expressions we set forth here:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene * * *. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interests in order and morality".
>
> (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 at p. 572)

"Magazines * * * are * * * subject to control if they are lewd, indecedent, obscene or profane".

(*Winters* v. *New York*, 333 N. Y. 507, 510; see also pp. 518, 519, 520)

"The protection even as to previous restraint is not absolutely unlimited * * *. The primary requirements of decency may be enforced against obscene publications."

(*Near* v. *Minnesota*, 283 U. S. 697, 716)

See also:

Beauharnais v. *Illinois*, 343 U. S. 250, 266;
Hannegan v. *Esquire, Inc.*, 327 U. S. 146, 158;
Ex parte Jackson, 96 U. S. 727, 736.

In the *Near* case, *supra*, upon which appellant places his chief reliance, the Minnesota statute involved authorized injunction of two kinds of publications: "(a) an obscene, lewd and lascivious newspaper, magazine or other periodical", and (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical". This Court specifically limited its holding as follows: "The statute so far as it authorized the proceedings in this action under Clause (b)" was held to be an infringement of liberty of the press. (283 U. S. at pp. 722-3)

The brief of the appellee in the action discusses the other questions in the case, and demonstrates that cases cited by appellant do not support his position. We are not repeating these matters in this brief, but have confined ourselves to the discussion of the legislative history of the statute involved and some of the fundamental principles with which the case is concerned.

We conclude the "Argument" with noting that appellant (Br. p. 41) contends that Section 22 a "prevents the book

from establishing its effect on the community". But presumably it is for the very purpose of preventing obscene speech and writing from establishing its effect on the community that this Court has said that it is not entitled to freedom to be expressed.

Conclusion

In the exercise of all of the freedoms guaranteed by the Constitution, there must be an accommodation between the individual's rights and the welfare of the society in which he enjoys these rights. This doctrine is axiomatic. Judge Fuld recalled it in his opinion in this case (R. p. 89; 1 N. Y. 2d p. 188). Mr. Justice Frankfurter stated in *Dennis* v. *United States*, 341 U. S. at p. 550:

> "Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right * * * to put some limitation upon expression."

One limitation upon freedom of expression which this Court has recognized in opinion after opinion (*supra*, Point II) is that there is no freedom of expression of the obscene.

The core of appellant's argument is resistance to the existence of any such limitation. He refers to this Court's statements of the limitations as "dicta." The Court of Appeals of New York read them as authority (R. pp. 81-2, 90-1; 1 N. Y. 2d 181, 189). The statements are, we believe, in the vein of assumption of a doctrine as to which there can be no question. And there can be no question as to the ability of society, through its government, halting the untrammeled purveying of obscenity, else the society would indeed become decadent.

Appellants throughout their brief (e.g. pp. 7-9) appear to be asking for a decision from this Court not on the issue in this case, based on the statute involved and on the sub-

ject matter of the action, but upon some hypothetical future case to which a decision in this case might some day be sought to be applied.

However, Justice Frankfurter but recently has commented on this Court's not yielding to the desire of counsel in any case to "secure comprehensive rulings". (*United States* v. *United Automobile Workers*, March 11, 1957) Two weeks earlier, in an opinion on February 25, 1957 in *Matter of Groban*, Mr. Justice Frankfurter took note of an argument made in that case, as to the extension to other proceedings of a holding by this Court that a party appearing before the Ohio State Fire Marshal was not required to be accorded the right of having counsel present. Justice Frankfurter's answer was:

> "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process".

This statement is in harmony with the repeated assurances by this Court that there is no reason to fear indiscriminate extension of a principle "while this Court sits". Mr. Justice Holmes in *Panhandle Oil Company* v. *Knox*, 277 U. S. 218, 223. Similarly, Chief Justice Vinson in *American Communication Association* v. *Douds*, 339 U. S. 382, 410; Mr. Justice Jackson in *Kovacs* v. *Cooper*, 336 U. S. 77, 97.

In this case are involved books of an extreme degree of obscenity, conceded by the appellants and found by the Trial Court and the Court of Appeals to be wholly obscene and of no literary merit or value. The constitutional guarantee of freedom of expression is of freedom to express ideas (*Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 572) and does not furnish protected shelter for letting loose upon society obscenity in speech or writing.

The statutory machinery provided in Section 22-a of the Code of Criminal Procedure of New York for dealing with such publications does not constitute prior restraint and affords complete due process. It has so been construed by the highest Court of New York.

The judgment appealed from should be affirmed and Section 22-a of the Code of Criminal Procedure of the State of New York declared to be in all respects constitutional.

April 15, 1957.

Respectfully submitted,

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APPENDIX I

Text of Statute Involved

Section 22-a of the Codes of Criminal Procedure of the State of New York (L. 1941, c. 925 as amended by L. 1954, c. 702 [effective July 1, 1954])

"22-a. Obscene prints and articles; jurisdiction

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or or[1] in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

[1] So in original. Second "or" probably should be omitted.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof.

APPENDIX II

Statutes Enacted in New York State in 1954-1956 Dealing With Distribution of Obscene Literature and Articles, in Addition to the Statute Involved in This Case.

[The description herein of the provisions of the several statutes refers only to their basic provision and omits details. The word "obscene" alone is used here in connection with the statutes. The statutes themselves contain additional terms describing the literature and materials to which they are made applicable]

L. 1954, c. 707—adding Section 1141-b to New York Penal Law. Prohibits "tie-in" sales compelling merchants to handle obscene literature.

L. 1955, c. 836—adding Article 49 to New York Penal Law. Makes it a misdemeanor to publish or distribute for resale publications, the title or titles of which contain the words crime, sex, horror or terror.

L. 1955, c. 832—adding to New York Penal Law § 1141 (3). Makes possession of six or more identical articles, whose sale is prohibited by Section 1141 of the Penal Law, presumptive evidence of violation of the section.

L. 1956, c. 123—amending New York Penal Law § 1141 (3). Makes possession of six or more similar articles, whose sale is prohibited by Section 1141 of the Penal Law, presumptive evidence of violation of the section.

L. 1956, c. 598—adding to New York Penal Law § 1141-c. Authorizes seizure by a peace officer of the State, of equipment used in photographing or producing, in the manner described in the section, pornographic, still or motion pictures, and vehicles other than common carriers used in the distribution of obscene articles, and forfeiture thereof.

L. 1956, c. 661—amending New York Penal Law § 1141 (1). Adds motion picture projectors to Penal Law prohibition against possession of mechanical contrivances with obscene motion pictures.

L. 1956, c. 662—amending New York Penal Law § 1141 (2). Increases the penalties for employing any minor to assist in violating the provisions of Section 1141 prohibiting the distribution of obscene articles.

L. 1956, c. 681—amending New York Penal Law § 1141 (1). Makes sale of sadistic and masochistic publications a misdemeanor.

L. 1956, c. 685—amending New York Penal Law § 1144. Permits the District Attorney to deliver seized obscene articles to the F.B.I., State Police or State or Federal investigative committees for investigation, laboratory examination or classification.

L. 1956, c. 599—amending New York Penal Law § 1143. Makes it misdemeanor to mail or transport any advertising material dealing with obscene articles.

L. 1956, c. 886—adding to New York Penal Law § 436-d. Makes it a misdemeanor to sell any publication, other than a rare book, manuscript or educational text, from which the cover or title page or other identification mark has been removed or obliterated.

L. 1956, c. 945—amending New York General Business Law §§ 330, 331. Requires every publication printed or reprinted after September 1, 1956, to have imprinted at one of the places thereof designated in the statute, the name and address of the publisher or printer. (Prior to the 1956 amendment, the statute had, for fifty years, required this information to be printed only in newspapers, magazines and periodicals.)

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 107.

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

v.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Supreme Court of the United States

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Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF *AMICUS CURIAE*

Interest of *Amicus*.

The New York Civil Liberties Union is a non-profit membership corporation dedicated to the preservation of the Bill of Rights, and particularly the rights guaranteed by the First Amendment. It sought (and obtained) the parties' consent to the filing of this brief because it considers the Statute involved in this case a serious threat to the freedom of the press. The stipulation consenting to the filing of this brief is appended.

The Statute Involved.

The statute involved in this case is Section 22-a of the New York Code of Criminal Procedure. The statute is set out at length at pages 2-4 of the Appellant's brief.

Section 22-a vests in the mayor and the corporation counsel or the equivalent officials of every New York city, town and village, the right to sue for an injunction against the sale or distribution of any book, magazine or printed matter found "obscene, lewd, lascivious, filthy, indecent or disgusting."

At first reading the section may appear to afford some advantage to the publisher, seller or distributor of condemned literature, for it provides for a civil restraint rather than punishment by fine or imprisonment. In its operation, the section is far more repressive of expression than the criminal laws. It may be assumed that the legislature intended the statute to be more inhibitive of communication than the penal law, for it was enacted to supplement criminal prosecutions that the legislature found inadequate: *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, at p. 182. Moreover the injunctive remedy does not preclude criminal prosecution. In fact, subdivision 5 of the statute creates a presumption of guilty knowledge, to facilitate criminal prosecution.

The statute under consideration provides for institution of an action for injunction against one who sells, distributes or is "*about to* sell or distribute" the book or magazine thought to be offensive. It thus permits action against the publisher of a book before it is sold or distributed to any wholesale or retail dealer.

Although there is no specific provision to that effect in Section 22-a, it enables a local official to secure a preliminary injunction against the sale or distribution of any disapproved book or magazine before trial or hearing. Such injunction may be obtained by virtue of the provisions of New York Civil Practice Act §877 authorizing the issuance of restraining orders *pendente lite* in an action "when it appears from the complaint that the plaintiff is entitled

to a judgment against the defendant restraining the commission or continuance of an act . . .'"*

The remedy of injunction is also more effective than penal sanctions in the suppression of writing thought to be improper because it dispenses with the heavy burden in a criminal case of proof beyond a reasonable doubt that the writing in question is improper.

POINT I.

There is no warrant or justification for the invasion of the freedom of the press authorized by the statute.

Concededly Section 22-a authorizes governmental interference with the press, and such interference will not be countenanced unless the evil the statute seeks to remedy presents a clear and grave danger to society. *Dennis* v. *United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh* v. *Alabama*, 326 U. S. 501, 508-509.

The court below assumed as the basis for its decision, that obscene books are in some way a menace to society. *Brown* v. *Kingsley Books*, 1 N. Y. 2d at p. 181. That assumption rested solely on the determination of the legislature that the law was needed. The court was aware that there has never been any proof or an objective finding that public injury follows from the publication of obscene writings. (See 1 N. Y. 2d 181, footnote 3, and *United*

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* Such an injunction was obtained in the instant case (R. 39). The New York City corporation counsel also sought a similar injunction in *Brown* v. *Meyers, et al.* (unreported), brought pursuant to section 22-a against the publisher and 59 booksellers to enjoin the sale and distribution of copies of 66 books.

States v. *Roth*, 237 Fed. 2d 796, 811-817)* Indeed, some authorities are of the opinion that obscene books do not incite to improper conduct, but on the contrary, act as safety valves, as outlets for impulses which if suppressed might lead to some injury to society. Obscenity and The Law, Norman St. John-Stevas, p. 189.

The mere enactment of a statute cannot, in the words of Mr. Justice Brandeis, "alone establish the facts which are essential to its validity." *Whitney* v. *California*, 274 U. S. 357, 374. See also *United States* v. *Carolene Products Co.*, 304 U. S. 144. The mere apprehension of a danger does not justify governmental interference with communication. To justify restraint of expression there must be something more than a fear of harm to society. It must be demonstrated that the danger is real and that it is sufficiently grave to override society's interest in, and need of, free expression.

It has been so frequently iterated that it is almost a commonplace that the democratic process is dependent on unhampered communication, and only the most serious and substantial evil—such as the danger of overthrow of the government by force—will justify any such broad interference with the freedom of the press. *Dennis* v. *United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh* v. *Alabama*, 326 U. S. 501, 508-509; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Bridges* v. *California*, 314 U. S. 252, 262; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Schneider* v. *State*, 308 U. S. 147, 161-162; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Stromberg* v. *California*, 283 U. S. 359, 369.

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* The basic question involved in this case is also presented in *Samuel Roth* v. *United States of America*, now pending before this Court (October Term, 1956, No. 582). The Court is respectfully referred to the excellent briefs of counsel for Petitioner and *Morris L. Ernst*, *Amicus Curiae* in the *Roth* case, for a more complete discussion of the problem. A reversal of the judgment in the *Roth* case would be determinative of the main issue in this appeal.

The basic premise of the statute is that the people of New York will be misled or inspired to anti-social behavior by filthy or disgusting writings—and must therefore be shielded from error or temptation. The burden is on the State to demonstrate the validity of that premise. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503-504. Since the burden cannot be or at least has not been sustained, the statute should be struck down as an unwarranted interference with the freedom of the press.

POINT II.

The statute under consideration is so vague that its enforcement would deprive those affected by it of property without due process.

Assuming *arguendo* that there is a need for the statute to meet an evil that cannot be dealt with except by interference with the basic right of communication, the statute should be held void because of its ambiguity.

Where the right of communication may be withheld under a statute, the statute must be clear and definite. Government officials charged with enforcing a vague law, since there is no standard for its application, must determine its meaning for themselves; the statute then changes with the person of the administrator. An indefinite law is in effect no law, and one who is deprived of a right pursuant to its provisions has been denied due process of law in violation of the Fourteenth Amendment to the Constitution. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Musser* v. *Utah*, 333 U. S. 95, 97; *Winters* v. *New York*, 333 U. S. 507, 515, 518; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 596; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77 (1948).

Section 22-a authorizes prohibition of the sale and confiscation of "obscene, lewd, lascivious, filthy, indecent or disgusting" books and magazines. The terms "obscene, lewd, lascivious" etc., are merely terms of disapprobation. Their recital is a denunciation, not an objective description of the nature of the material that may be suppressed. Not one of the terms of the statute satisfies the "due process requirements of definiteness."

We are concerned here principally with the term "obscene" which Judge FULD, in his opinion below described as "unprecise" and "vague", the meaning of which must be largely "left to the gradual development of general notions about what is decent"* (1 N. Y. 2d pp. 181-182). That is hardly an adequate guide for the judge called upon to apply the standard of "obscene" in a particular case. There is some dicta of this Court to the effect that "obscene" publications may be punished, *Near* v. *Minnesota*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-2. And in *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848, a judgment convicting defendant of publishing an "obscene, lascivious, filthy and disgusting book" was affirmed by an evenly divided court. But more recent authority indicates that a contrary determination may be reached by the present Court. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870.

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* Quoting Judge LEARNED HAND, *United States* v. *Kennerley*, 209 F. 119, 121.

POINT III.

The statute imposes an unconstitutional, prior restraint on freedom of communication.

The First Amendment guaranty of freedom of the press was adopted primarily to prevent censorship prior to publication; and any interference with communication in advance of publication is especially condemned. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503-504; *Lovell* v. *Griffin*, 303 U. S. 444, 451-452; *Near* v. *Minnesota*, 283 U. S. 697, 713-716; *Patterson* v. *Colorado*, 205 U. S. 454, 462.

The question of whether the First Amendment grants total immunity from previous restraints upon publication has not been determined, but it is clear that such prior restraint, if permissible at all, can be permitted only under extreme and exceptional circumstances. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at p. 504. It cannot be claimed that the situation with which Section 22a purported to deal is so extreme or exceptional as to warrant the imposition of interference in advance of publication.

Judge FULD, in his opinion below, indicated that Section 22-a does not impose a prior restraint upon publication since it does not require the submission of books and writing for an imprimatur before circulation. 1 N. Y. 2d at p. 185. While the statute does not impose so pervasive a restraint as a licensing law, it does permit interference with books and magazines in advance of their publication, and for that reason is particularly offensive to the Constitution.

The right to publish obviously includes the right to circulate and distribute. *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Martin* v. *Struthers*, 319 U. S. 141; *Grosjean* v. *American Press Co.*, 297 U. S. 233. Under Section 22-a of the New York Criminal Code, a publication may be sup-

pressed before it is delivered to or seen by any potential reader, and, indeed, before it is forwarded to any dealer who may make it available to the public.

The purpose of the prohibition of prior restraint is to prevent the government from stifling expression before it may be communicated. Whether the expression is repressed before publication by means of a licensing law or by means of injunction or any other device is wholly immaterial.

Even if obscene books do constitute an evil sufficiently grave to justify government intervention, such interference with the freedom of the press can constitutionally be exercised only by subsequent punishment and not by a statute, such as the one under consideration, authorizing suppression in advance of publication. As Mr. Chief Justice HUGHES wrote in *Near* v. *Minnesota*, 283 U. S. 697, 720:

> "The fact that the liberty of the press may be abused . . . does not make any less necessary the immunity of the press from previous restraint . . . Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Conclusion.

The judgment of the Court below should be reversed and Section 22-a of the New York Code of Criminal Procedure should be declared unconstitutional as a violation of the freedom of the press guaranteed by the First and Fourteenth Amendments.

Respectfully submitted,

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APPENDIX.

Stipulation.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 107.

KINGSLEY BOOKS, INC., *et al.*,

Appellant,

against

PETER CAMPBELL BROWN, etc.,

Appellee.

The undersigned, as counsel for the parties to the above-entitled appeal, consent to the filing of a brief by the New York Civil Liberties Union as *amicus curiae* herein.

Dated: New York, N. Y., March 13, 1957.

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PETER CAMPBELL BROWN,
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